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Supreme Court of the United States

SALOMON, *et al.*,
Plaintiff-in-error,
vs.
STATE TAX COMMISSION OF NEW YORK.

OCTOBER TERM 1928
No. 79

SIMONSON, *et al.*,
Plaintiff-in-error,
vs.
STATE TAX COMMISSION OF NEW YORK.

OCTOBER TERM 1928
No. 80

APPENDIX.

Containing pertinent sections of New York Transfer Tax Law in effect on dates of death of decedents herein.

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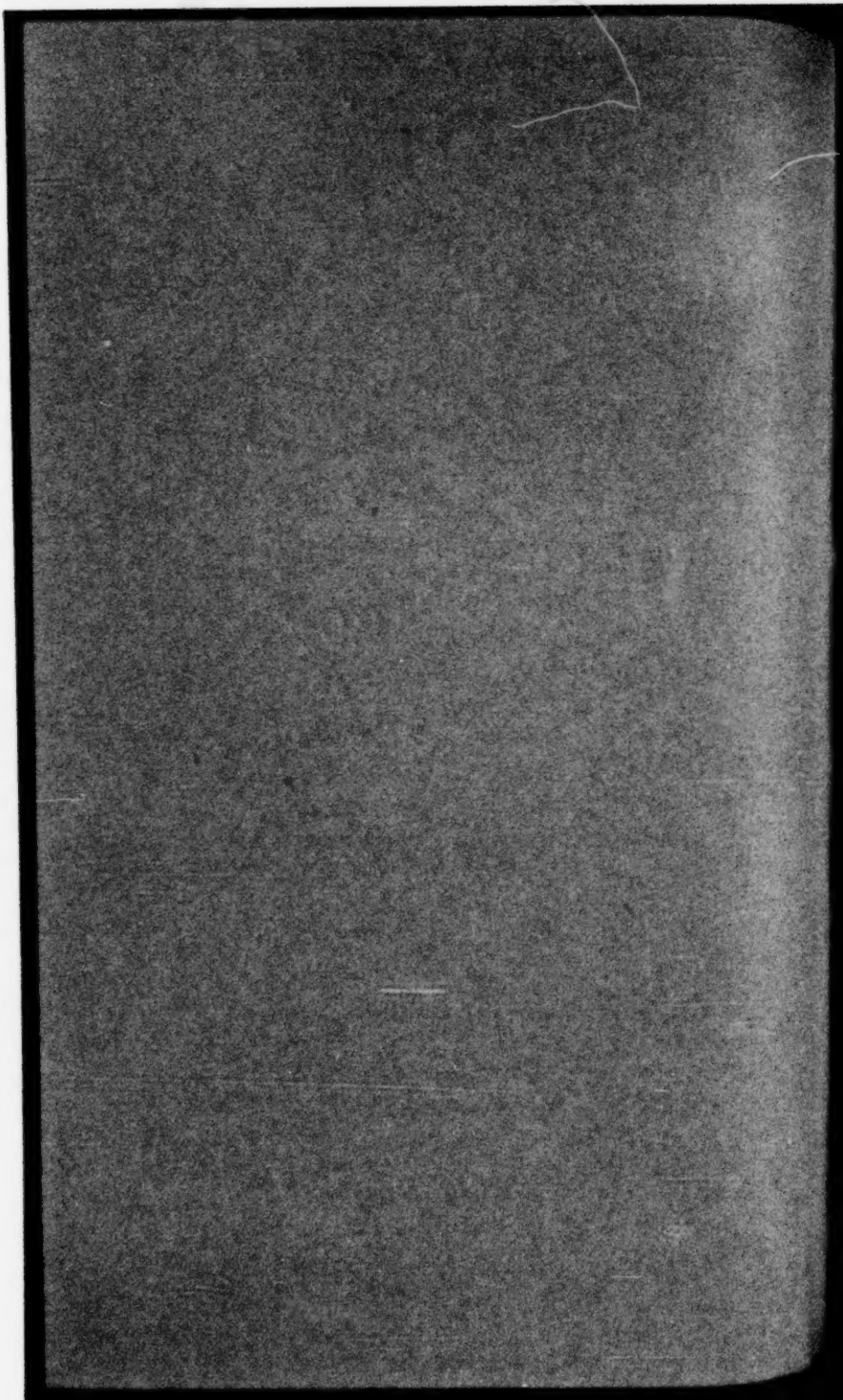

APPENDIX

Containing pertinent sections of New York Transfer Tax Law in effect on the dates of death of decedents herein.

ARTICLE 10

Transfer Taxes

(Schedule of Sections omitted.)

§ 220. Taxable transfers. A tax shall be and is hereby imposed upon the transfer of any property real or personal, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed thereof while a resident of the state.

2. In the case of a nonresident decedent when the transfer is by will or intestate law of any of the following items:

(a) Real property within this state, or goods, wares and merchandise within this state.

(b) Shares of stock or certificates of interest of corporations organized under the laws of this state, or of national banking associations located in this state, or of joint stock companies or associations organized under the laws of this state and including all dividends and rights to subscribe to the stock of such corporations, joint stock companies or associations or banks.

(c) Property evidenced by or consisting of shares of stock of a foreign corporation, joint stock company or association, or bonds, notes, mortgages or other evidences of interest in any corporation, joint stock company or association wherever incorporated or organized where the property represented by such shares of stock, bonds, notes, mortgages or other evidences of interest, consists of real property which is located wholly, or partly, within this state to the extent to which the value of the said items respectively is enhanced, or is represented, or is secured by real estate in the state of New York owned by such corporation, joint stock company or association. There shall be excepted from the classification of this subdivision all of such items where such corporation, joint stock company or association is or is in the nature of a moneyed corporation, a railroad or transportation corporation, a public service or manufacturing corporation as defined or classified by the laws of this state.

(d) The interest of such decedent in any partnership business conducted, wholly or partly, within the state of New York to the extent of the interest of the decedent in the partnership property within this state and the good will of such business within this state.

(e) Capital invested in business within this state.

Nothing in this section shall be taken to include deposits in banks or trust companies or with persons or corporations acting as bankers, or to permit of a transfer tax by reason of keeping securities, other than those taxable under this article, within the state.

3. All property taxable under this section not specifically bequeathed or devised, including transfers under a residuary clause in a will, shall be deemed to be transferred proportionately among all the general legatees and devisees in accordance with their several interests

in the estate, and in case of intestacy according to the proportions stated by the statute of distributions applicable thereto.

4. When the transfer is of property made by a resident, or is of property of a nonresident included within any of the classes named in subdivision two; and is made by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor, or donor or intended to take effect in possession or enjoyment at or after such death, or where any change in the use of enjoyment of property included in such transfer, or the income thereof, may occur in the lifetime of the grantor, vendor or donor by reason of any power reserved to or conferred upon the grantor, vendor or donor, either solely or in conjunction with any person or persons to alter, or to amend, or to revoke any transfer, or any portion thereof, as to the portion remaining at the time of the death of the grantor, vendor or donor, thus subject to alteration, amendment or revocation. If any one of the foregoing transfers is made for a valuable consideration, the portion of the transfer for which the grantor or vendor receives equivalent monetary value is not taxable, but the remaining portion thereof is taxable.

5. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer whether made before or after the passage of this chapter.

6. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to

which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will, and if the donee of the power is a nonresident all of the property and the proceeds of the property which was subject to taxation under this section at the time of the death of the donor shall be deemed to be included in the transfer.

7. Whenever property is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property, shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor by will; been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will; except that in the case of tenancies by the entirety the surviving tenant shall be taxable only on one half of the value of the property so transferred.

8. The tax imposed hereby shall be upon the clear market value of such property at the rates hereinafter prescribed.

§ 221. Exceptions and Limitations. (This section exempts from taxation the property transferred to charitable, religious, and other similar corporations.) (Not material)

§ 221-a. Rates of tax. 1. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five thousand dollars, to any father, mother, husband, wife, or child of the decedents, grantor, bargainor, donor or vendor, or to any child adopted as such in conformity with the laws of this state, of the decedent, grantor, bargainor, donor or vendor, or upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five hundred dollars to any lineal descendant of the decedent, grantor, bargainor, donor or vendor, born in lawful wedlock, the tax on such transfers shall be at the rate of

One per centum on any amount up to and including the sum of twenty-five thousand dollars;

Two per centum on the next seventy-five thousand dollars or any part thereof;

Three per centum on the next one hundred thousand dollars or any part thereof;

Four per centum on the amount representing the balance of each individual transfer.

2. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five hundred dollars, to a brother, sister, wife or widow of a son, or the husband of a daughter of the decedent, grantor, bargainor, donor or vendor, or to any child to whom any such decedent, grantor, bargainor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, the tax on such transfers shall be at the rate of

Two per centum on any amount up to and including the sum of twenty-five thousand dollars;

Three per centum on the next seventy-five thousand dollars or any part thereof;

Four per centum on the next one hundred thousand dollars or any part thereof;

Five per centum on the amount representing the balance of each individual transfer.

3. Upon all transfers taxable under this article of property or any beneficial interest therein of an amount in excess of the value of five hundred dollars, to any person or corporation other than those enumerated in paragraphs one and two of this section the tax on such transfers shall be at the rate of

Five per centum on any amount up to and including the sum of twenty-five thousand dollars;

Six per centum on the next seventy-five thousand dollars or any part thereof;

Seven per centum on the next one hundred thousand dollars or any part thereof;

Eight per centum on the amount representing the balance of each individual transfer.

§ 221 b. Repealed.

§ 221 c. Relates to non resident estates. (Not material)

§ 221 d. Relates to non resident estates. (Not material)

§ 222. Accrual and payment of tax. All taxes imposed by this article shall be due and payable at the time of the transfer, except as herein otherwise provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof can not be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when

the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof. Such tax shall be paid to the tax commission in a county in which the office of appraiser is salaried, and in other counties, to the county treasurer, and said tax commission or county treasurer shall furnish, and every executor, administrator or trustee shall take, duplicate receipts of such payment as provided in section two hundred and thirty-six.

§ 223. Discount and interest. If such tax is paid within six months from the accrual thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accrual thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax can not be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged; provided, however, that whenever the payment of any tax imposed by this article and payable to a county treasurer has been heretofore or shall be hereafter tendered, through inadvertence, to the tax commission within the period of time before interest attaches to said tax, if such tax is paid in full to the treasurer of the proper county within ten days thereafter, the county treasurer, when directed so to do by the tax commission, may receipt in full for such tax without collecting any interest imposed thereon by this section of the tax law.

§ 224. Lien of tax and collection by executors, administrators and trustees. Every such tax shall be and

remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, administrator or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the tax commission or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien or charge on such real property until paid; and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

§ 225. Refund of tax erroneously paid. (Not material)

§ 226. Taxes upon bequests and devises in lieu of commission. (Not material)

§ 227. Liability of certain corporations to tax. (Not material)

§ 228. Jurisdiction of the surrogate. The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction.

When it is made to appear to a surrogate of any county in this state that a safe deposit company, trust company, bank, person or corporation has in its possession or under its control papers of a decedent of whose estate such court has jurisdiction or that the decedent has leased from such a corporation a safe deposit box, and that such papers or such safe deposit box may contain a will of the decedent, or a deed to a burial plot in which the decedent is to be interred, he may make an order directing such safe deposit company, trust company, bank, person or corporation to permit a person named in the order to examine such papers or safe deposit box in the presence of a representative of the tax commission and an officer of such safe deposit company, trust company, bank or corporation, or agent of such person, and if a paper purporting to be a will of the decedent, or the deed to a burial plot is found among such papers, or in such box, to deliver such will to the clerk of the surrogate's court of

such county, or such deed to such person as may be designated in such order. The clerk of said court shall furnish a receipt upon the delivery to him of the will.

§ 229. Appointment of appraisers, stenographers, and clerks. (Not material)

§ 230. Proceedings by appraiser. (As amended by Chap. 144 Laws 1925. New matter in italics.) In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion, or upon the application of any interested person, including the tax commission, shall by order direct the person or one of the persons appointed pursuant to section two hundred and twenty-nine of this chapter in counties in which the office of appraiser is salaried, and in other counties, the county treasurer, to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article.

Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the tax commission, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall at such time and place appraise the same at its fair market value as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to said matter as the surrogate may order or require. Every appraiser, except in the counties in which

the office of appraiser is salaried, for which provision is hereinbefore made, shall be paid his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record, payment to be made out of moneys appropriated for such purpose. No deduction shall be allowed from the appraised value of the property transferred on account of any liability of decedent incurred or assumed by the acquisition, care, improvement, use, enjoyment or disposition of property without the state, the transfer of which is not subject to tax under the provisions of this article. Any transfer of his property made by a decedent by deed, sale or gift within two years prior to his death, without a valid and adequate consideration therefor, shall be presumed to have been made in contemplation of death within the meaning of this chapter.

The value of every future or limited estate, income, interest or annuity for any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum.

In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said

estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty five of this chapter.

Where any property shall, after the passage of this chapter, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this article in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interest is derived.

When property is transfered in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, *which tax shall be computed on the full, undiminished value of such property at the time of the transfer without deduction for or on account of any intervening estate or interest*, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision; pro-

vided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, *computed upon the full, undiminished value of the property as aforesaid;* and the executor or trustee of each estate, or the legal representative having charge of the trust fund, shall immediately upon the happening of said contingencies or conditions apply to the surrogate of the proper county, upon a verified petition setting forth all the facts, and giving at least ten days' notice by mail to all interested persons or corporations, for an order modifying the temporary taxing order of said surrogate so as to provide for the final assessment and determination of the tax in accordance with the ultimate transfer or devolution of said property. *If application for modification of the temporary taxing order is not made within six months after the happening of any contingency or condition the tax as finally fixed and determined shall bear interest at the rate of six per centum per annum from the date when such contingency or condition happened to the date of the entry of the modifying order, which interest shall be in addition to the interest imposed by section two hundred and twenty three of this article for nonpayment of the tax at the highest possible rate within eighteen months from the date of the transfer.* Whenever a tax on a transfer dependent on a contingency or condition has been determined at the highest rate in the manner prescribed by the foregoing provisions, *and the personal property included in the transfer is less than the amount of said tax,* the executors or trustees, in

lieu of paying the amount so determined, may elect to file in the office of the tax commission a bond to the people of the state, approved as to form and amount by the tax commission, for the purpose of securing the payment of the tax on such transfer. The tax commission at any time may increase or decrease the amount of such bond as conditions may require.

Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting.

The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the tax commission.

§ 231. Determination of surrogate. From such report of appraisal and other proof relating to any such estate before the surrogate, the surrogate shall forthwith, as of course, determine the cash value of all estates and the amount of tax to which the same are liable; or the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser.

The superintendent of insurance shall, on the application of any surrogate or appraiser, determine the value of any such future or contingent estates, income and in

terest therein limited for the life or lives of persons in being, upon the facts contained in any such appraiser's report and certify the same to the surrogate or appraiser, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct.

The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this article and of the tax to which it is liable, to all persons known to be interested therein, and shall immediately forward a copy of such taxing order to the tax commission. The surrogate shall also forward to the tax commission copies of all orders entered by him in relation to or affecting in any way the transfer tax on any estate, including orders of exemption.

If, however, it appear at any stage of the proceedings that any of such persons known to be interested in the estate is an infant or an incompetent, the surrogate may, if the interest of such infant or incompetent is presently involved and is adverse to that of any of the other persons interested therein, appoint a special guardian of such infant; but nothing in this provision shall affect the right of an infant over fourteen years of age or of any one on behalf of an infant under fourteen years of age to nominate and apply for the appointment of a special guardian for such infant at any stage of the proceedings.

§ 232. Appeal and other proceedings. The tax commission or any person dissatisfied with the appraisement or assessment and determination of tax may appeal therefrom to the surrogate within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken; but no costs shall be allowed by the surrogate on such appeal.

Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the tax commission may, if it believes that such appraisal, assessment or determination has been fraudulently, collusively or erroneously made, make application to a justice of the supreme court of the judicial district embracing the surrogate's court in which the order or decree has been filed, for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers and be subject to the duties of an appraiser under section two hundred and thirty and shall receive compensation at the rate of five dollars per day for every day actually and necessarily employed in such appraisal. Such compensation shall be payable by the tax commission out of moneys appropriated for such purpose, upon the certificate of the justice appointing him. The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as are herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the tax commission, and a certified copy thereof transmitted to the surrogate's court of the proper county.

§ 233. Composition of transfer tax upon certain estates. (Not material)

§ 234. Surrogates' assistants in New York, etc. (Not material)

§ 235. Proceedings by District Attorney. (Not material)

§ 236. **Receipts for taxes.** (Not material)

§ 237. **Fees of County Treasurer.** (Not material)

§ 238. **Books and forms to be furnished by the Tax Commission.** (Not material)

§ 239. **Reports of Surrogate and County Clerk.** (Not material)

§ 240. **Reports of County Treasurer.** (Not material)

§ 241. **Disposition of revenues; tax on contingent remainders; refunds in certain cases.** (As amended by Chap. 144 L. 1925. New matter in italics.) The tax commission shall deposit all taxes collected by it under this article, except as hereinafter otherwise provided, in a responsible bank, banking house or trust company in the city of Albany, which shall pay the highest rate of interest to the state for such deposit, to the credit of the state comptroller on account of the transfer tax. And every such bank, banking house or trust company shall execute and file in his office an undertaking to the state, in the sum, and with such sureties, as are required and approved by the comptroller, for the safe keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as the comptroller may fix. Every such undertaking shall have indorsed thereon, or annexed thereto, the approval of the attorney general as to its form. The tax commission shall on the first day of each month make a verified return to the state treasurer of all taxes received by it under this article, stating for what estate, and by whom and when paid; and shall credit itself with all expenditures made since its last previous return on account of

such taxes, for refunds lawfully chargeable thereto. The comptroller shall on or before the tenth day of each month pay to the state treasurer the balances of such taxes remaining in his hands at the close of business on the last day of the previous month.

Whenever the tax on a contingent remainder has been determined at the highest rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the tax commission, in the counties wherein this tax is payable direct to it, and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate the tax assessed upon such contingent remainders, and the tax commission or the county treasurer shall deposit the amount of tax so retained in some solvent trust company or trust companies or savings banks in this state designated by the state comptroller, to the credit of the state comptroller on account of such estate, paying the interest thereon when collected by him to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will. Upon the happening of the contingencies or conditions whereby the remainder ultimately vests in possession, if the remainder then passes to persons taxable at the highest rate, the state comptroller on the certificate of the tax commission, shall turn over the amount so retained to the state treasurer as provided herein and by section two hundred and forty of this chapter, or if the remainder ultimately vests in persons taxable at a lower rate or a person or corporation exempt from taxation by the provisions of this article, the state comptroller on the certificate of the tax commission shall refund any excess of tax so held to the executor or trustee of the estate, to be disposed of by said executor or trustee as provided by the decedent's will. Executors or trustees

of any estate may elect to assign to and deposit with the tax commission or the county treasurer, bonds or other securities of the estate approved by the tax commission, both as to the form of the collateral and the amount thereof, for the purpose of securing the payment of the tax on said remainder, which said bonds or other securities shall be held by the tax commission, or the county treasurer to the credit of said estate until the actual vesting of said remainders, the income therefrom when received by the tax commission or the county treasurer to be paid over to the executor or trustee during the continuance of the trust estates.

If any executor or trustee shall have deposited with the tax commission or the county treasurer, cash or securities, or both cash and securities, to an amount in excess of the sum necessary to pay the transfer tax upon such contingent remainders, the excess of tax so deposited shall be returned to the executor or trustee, or if any executor or trustee shall have deposited with the tax commission, or the county treasurer, cash or securities, or both cash and securities, to an amount less than is sufficient to pay the tax upon such contingent remainders as finally assessed and determined, the executor or trustee of said estate shall forthwith, upon the entry of the order determining the correct amount of tax due, pay to the tax commission, or the county treasurer, whichever is entitled under the provisions of this article to receive the tax, the balance due on account of said tax. *In case securities shall have been deposited and the tax upon such contingent remainders as finally assessed and determined shall be paid, the executor or trustee shall be entitled to the return of such securities; but if the tax is not paid within sixty days after the entry of the order finally assessing and determining the tax, the tax commission may sell the securities so deposited in the open market or at*

public auction, at its option, and apply the proceeds thereof to the payment of the tax. If on account of the time or manner of payment of a tax under this article it be impossible to identify or separate the portion thereof paid on account of a contingent remainder pursuant to this section and the whole of such payment shall have been deposited in the state treasury, the portion of the tax on account of such contingent remainder to be held or deposited on account of the estate pursuant to this section shall be deemed a refund under this article, and shall be drawn, on the certificate of the tax commission and approval of the comptroller, from moneys deposited with the state comptroller and available for refunds under this article, and when so drawn shall be deposited to the credit of the state comptroller on account of the estate as provided by this section. Bonds or other securities to be deposited with the tax commission pursuant to this section shall be turned over by it to the state comptroller for safe keeping.

§ 242. Application of taxes. All taxes levied and collected under this article when paid into the treasury of the state shall be applicable to the expenses of the state government and to such other purposes as the legislature shall by law direct.

§ 243. Definitions. The words "estate" and "property," as used in this article, shall be taken to mean the property or interest therein passing or transferred to individuals or corporate legatees, devisees, heirs, next of kin, grantees, donees or vendees, and not as the property or interest therein of the decedent, grantor, donor or vendor and shall include all property or interest therein, whether situated within or without the state. The word "transfer" as used in this article shall be taken to include the passing of property or any interest therein in

the possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words "county treasurer" and "district attorney," as used in this article, shall be taken to mean the treasurer or the district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-eight of this article. The words "the intestate laws of this state," as used in this article, shall be taken to refer to all transfers of property, or any beneficial interest therein, effected by the statute of descent and distribution and the transfer of any property, or any beneficial interest therein, effected by operation of law upon the death of a person omitting to make a valid disposition thereof, including a husband's right as tenant by the courtesy or the right of a husband to succeed to the personal property of his wife who dies intestate leaving no descendants her surviving. For any and all purposes of this article and for the just imposition of the transfer tax, every person shall be deemed to have died a resident and not a nonresident, of the state of New York, if and when such person shall have dwelt or shall have lodged in this state during and for the greater part of any period of twelve consecutive months in the twenty-four months next preceding his or her death; and also if and when by formal written instrument executed within one year prior to his or her death or by last will he or she shall have declared himself or herself to be a resident or a citizen of this state, notwithstanding that from time to time during such twenty-four months such person may have sojourned outside of this state and whether or not such person may or may not have voted or have been entitled to vote or have been assessed for taxes in this state; and also if and when such person shall have been a citizen of New York sojourning outside of this state. The burden

of proof in a transfer tax proceeding shall be upon those claiming exemption by reason of the alleged nonresidence of the deceased. The wife of any person who would be deemed a resident under this section shall also be deemed a resident and her estate subject to the payment of a transfer tax as herein provided, unless said wife has a domicile separate from him.

§ 244. Exemptions in Article I not applicable. (Not material)

§ 245. Limitation of time. (Not material)

Supreme Court of the United States

OCTOBER TERM, 1926

No. 78.

LEO SALOMON, JACQUES H. ERCKT, ISIDORE M. KASTNER, et al., etc.,

Plaintiffs in Error,

vs.

STATE TAX COMMISSION OF NEW YORK.

BRIEF OF PLAINTIFFS IN ERROR.

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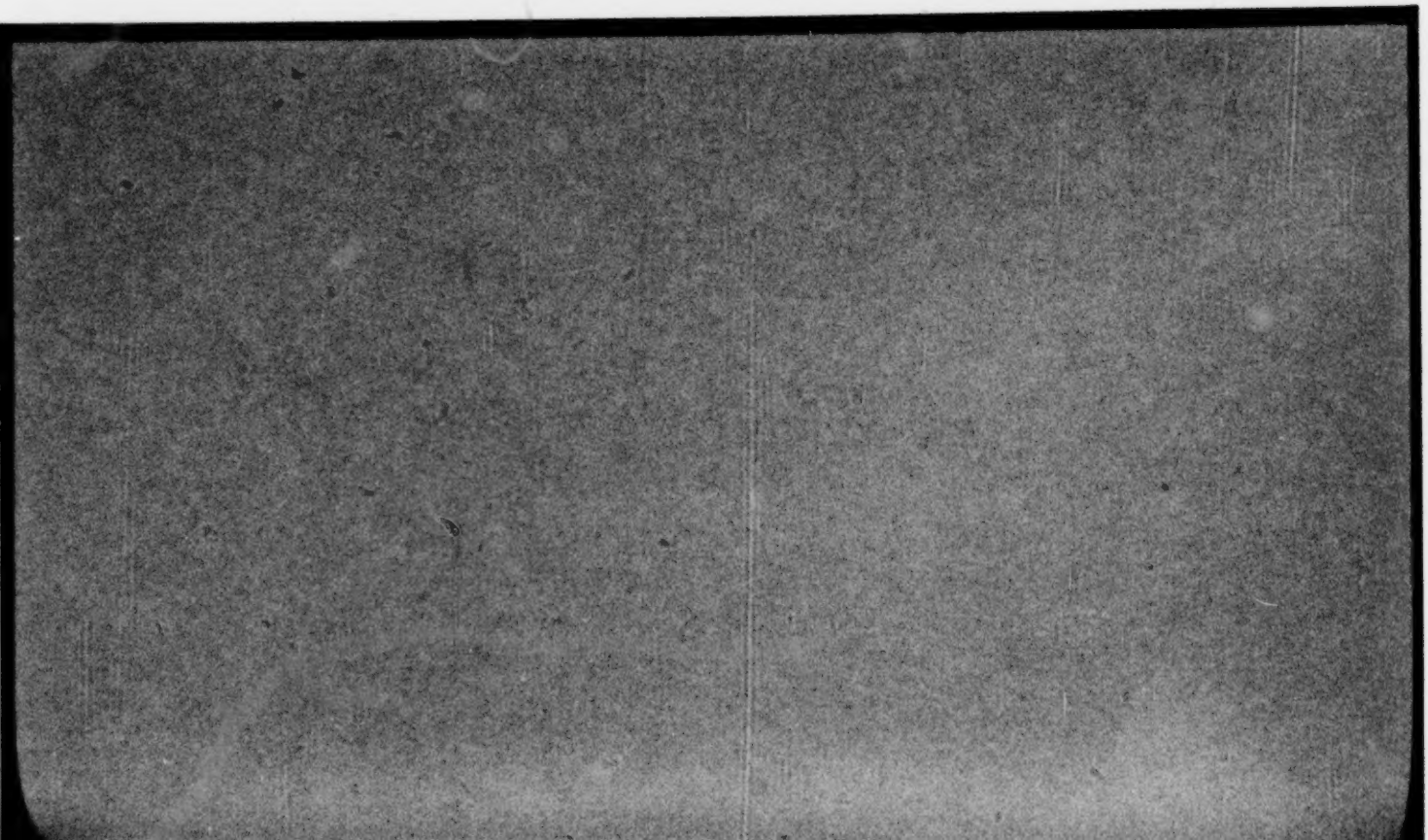

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Supreme Court of the United States

LEO SALOMON, JACQUES H. HECHT, ISIDORE M. KASTNER, *et al.*, etc., *Plaintiffs in Error,* *against* STATE TAX COMMISSION OF NEW YORK.	OCTOBER TERM 1928 No. 79

BRIEF OF PLAINTIFFS IN ERROR.

This case arises on a Writ of Error to the Surrogates' Court of the County of New York, State of New York, to review the determination of the Court of Appeals of that State, holding that Chapter 144 of the Laws of 1925 amending Sections 230 and 241 of the New York Tax Law, is not in conflict with the Fourteenth Amendment to the Constitution of the United States. The Writ was allowed and issued on February 7, 1928 (R., 55, 57). At that time Section 2 of the Act of January 31, 1928, in reference to Writs of Error (which said section was repealed on April 26, 1928), was in effect (*Robertson on Appellate Practice and Procedure in the Supreme Court of the United States, Appendix D,* page 309). The proviso contained in said Section 2 was construed by us as continuing the practice theretofore prevailing, in cases where it was sought to review the judgments of State courts of last resort. (*Robertson on Appellate Practice and Procedure*, p. 315.) If this construction should be incorrect, we respectfully ask the Court to treat the Writ of Error as an appeal, pursuant to the provisions of Section 861 of the Judicial Code. (*Robertson op. cit. supra*, p. 317.)

The opinions rendered in the courts below are reported as follows: That of the Surrogates' Court, 127 Misc. 211, and that of the Appellate Division, 219 App. Div. 656. The Court of Appeals delivered no opinion. 246 N. Y. 602.

Statement as to Jurisdiction.

The statutory provision believed to sustain the jurisdiction of this Court is subdivision (a) of Section 237 of the Judicial Code. The date of the judgment sought to be reviewed was December 15, 1927 (R., 47). The date on which the application for the Writ was made was February 7, 1928 (R., 51).

The ground on which the jurisdiction of this Court is invoked is, that there has been a final judgment in a suit in the highest court of the State in which a decision in the suit could be had, where there was drawn in question the validity of a statute of the State of New York, to-wit, Chapter 144 of the Laws of 1925, amending Sections 230 and 241 of the New York Tax Law, on the ground of its being repugnant to the Constitution of the United States, and that the decision in the State court was in favor of the statute's validity (R., 5, 36, 37, 2, 44, 48 and 51).

Cases believed to sustain the Court's jurisdiction are: *Weston* v. *Charleston*, 2 Pet. 448, 464, 465; *Mt. Vernon Cotton Co.* v. *Alabama Power Co.*, 240 U. S. 30; *Central Trans. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 40; *St. Louis I. M. & S. Railroad Company* v. *Southern Express Co.*, 108 U. S. 24; *Winthrop Iron Company* v. *Meeker*, 109 U. S. 180; *Worall* v. *Banks*, 77 U. S. 583; *Watson* v. *State Comptroller*, 254 U. S. 122; *Wheeler* v. *Sohmer*, 233 U. S. 434.

There is one feature of the New York transfer tax practice which is rather anomalous, and which if un-

explained might lead to confusion as to the finality of the judgment here sought to be reviewed. The order assessing the tax which is made by the Surrogate in the first instance (R., 2, 3) upon the report of the Official Appraiser, is made by him *not* as a judicial officer, but as a mere tax assessor. (*Matter of Steinwender*, 172 App. Div. 871, 872; *Matter of Costello*, 189 N. Y. 288.) Accordingly, the judicial proceeding (which evidently constitutes the "suit" contemplated by subdivision (a) of Section 237 of the Judicial Code) is initiated with the so-called "appeal" under Section 232 of the New York Tax Law, which results in the judicial review by the Surrogate (acting as a judicial officer) of his prior action as a tax officer.

That judicial proceeding has been brought to a conclusion, so far as the courts of New York State are concerned, by the final order which the Surrogate entered pursuant to the mandate of the Court of Appeals, and which constituted an affirmance of his own decision rendered upon the original "appeal" to him. That particular litigation is at an end.

Therefore, it seems to us immaterial that the order assessing the tax made by the Surrogate *as a tax officer*, is characterized by the statute (Section 230) in cases such as this, where there are contingent remainders, as a "temporary" order. The reason why it is called "temporary" is that since the New York Transfer Tax Law varies in respect of rates according to the relationship of the distributees of the estate, to the deceased, it is not possible in such cases to ascertain at the time that the original assessment is made, the rate of tax that will be applicable in computing the tax on such remainders. Therefore, the statute requires that the tax on such contingent remainders be assessed and determined in the first instance by the Surrogate, acting as a tax officer, at the highest rate that would be possible under any con-

tingency. The tax as thus computed is used as the measure of the security that is exacted from the taxpayer for the purpose of guaranteeing to the State the payment of the tax on the contingent remainders, as ultimtaely computed. Later, when the remainders become vested and the applicable rate is known, there is a recomputation of the tax made by the Surrogate and a corresponding adjustment. This, of course, is a mere mathematical calculation which must likewise be deemed to be made by the Surrogate as a ministerial officer.

The object of the judicial proceeding which we initiated by our original "appeal" to the Surrogate was to invoke the protection of the United States Constitution against the action of the Surrogate as a tax officer, embodied in the said order assessing the tax, and which, when read in connection with the statute, requires us, under pain of severe penalties, to furnish to the State of New York cash or acceptable securities to guarantee the ultimate payment to the State of a tax believed by us to be unconstitutional. So far as the State courts are concerned, it has been finally determined that we are not entitled to that protection. It is that determination of the State courts which we are here seeking to review.

The fact that at some later date the same tax officer will do something *additional* under the statute, resulting not only in the seizure of our property as security for the payment of an unconstitutional tax, but also in the State's actually realizing on that security, in no way affects, we respectfully submit, the jurisdictional question involved.

Reference to the records on appeal in the cases of *Wheeler* v. *Sohmer*, 233 U. S. 434, and *Watson* v. *State Comptroller*, 254 U. S. 122, shows that similar orders were there involved (although the jurisdictional question is not discussed in the briefs), and that this Court entertained jurisdiction.

Statement of Facts.

The decedent, Meyer Hecht, died on April 2, 1925, subsequently to the date when the statute here in question took effect (R., 6, 37). He left a Will, which was duly admitted to probate by the Surrogates' Court of the County of New York (R., 6), and Letters Testamentary thereon were duly issued by said Court to the Plaintiffs in Error, the Executors and Trustees therein named (R., 6).

By such Will said decedent, after bequeathing a number of general and specific legacies, gave his residuary estate to his trustees in trust to pay the income thereof to his widow, Pauline Hecht, during her life, and upon her death to divide the principal of the trust into as many equal shares as there were children of the testator then living and children of his then deceased of whom issue were then living, and he devised and bequeathed one such share to each of his then living children, and one such share to the then living issue *per stirpes* of each of his deceased children, such issue to receive their respective portions on attaining majority except that in the case of granddaughters marrying during minority, distribution was to be made to them upon their marriage (R., 31, 32).

Pursuant to the New York statute, an official Transfer Tax Appraiser was designated by the Surrogate to appraise the decedent's estate for the purpose of computing the transfer tax due thereon (R., 6). This Appraiser fixed the value of the gross estate of the decedent at the time of his death at $452,954.54 (R., 7). Against this amount he allowed deductions totaling $47,540.17, and thus specifically found as a fact in his report to the Surrogate, that "The total of all property passing upon the death of the decedent I appraise at $405,414.37" (R., 8).

As the rates under the New York Transfer Tax Statute are graduated according to the amount transferred to each legatee or other beneficiary, and the relationship or absence thereof between the deceased and such legatee or other beneficiary, the Appraiser is required to determine the aliquot share of each such beneficiary in the decedent's estate. (R., 8). Accordingly, the said Appraiser fixed the value of the respective shares of the general and specific legatees in the decedent's estate, at the face value of their general legacies, or at the appraised value of the articles specifically bequeathed (R., 9). These general and specific legacies aggregated $83,320, thus leaving a total residuary estate of $322,094.37. (R., 10). Pursuant to the terms of the statute, (Sect. 230, 3rd par.) the aliquot share of Pauline Hecht, the testator's widow and the life beneficiary of the residuary estate, was fixed by the Appraiser, upon the basis of the tables of mortality, using a five per cent rate of interest, at $124,957 (R., 10). This sum was treated as having been transferred by the decedent outright to his widow (R., 3, 10). Thus, necessarily the balance of the estate remaining after deducting from the said total of $405,414.37 (as determined by the Appraiser) the total amount of the aliquot shares of said widow and said general and specific legatees, as fixed by said Appraiser, to-wit, $208,277, was $197,137.37. This last mentioned amount therefore necessarily represented the aliquot share in the decedent's estate of the other beneficiaries under his will, viz. the said remaindermen.

The Appraiser, however, acting under the provisions of the statute (as amended by said Chap. 144 of the Laws of 1925 and as construed by the courts below), in determining the aliquot share of the said remaindermen in the estate, substituted for the said sum of $197,137.37, the value of the entire residuary estate, to-wit, $322,-

094.37, and thus reallocated that entire fund to them, as though it had been bequeathed to them outright (R., 10). Thus, while the Appraiser found as a fact that the total amount of property which passed upon the death of the decedent was $405,414.37, he fixed the total amount of the respective shares of the beneficiaries in the said estate at $530,371.37, being $124,957 in excess of the whole estate (R., 9, 10).

Subsequently thereto an order was made by the Surrogate as a tax officer assessing a transfer tax against the said estate as though the total amount of property which passed upon the death of the decedent had been $530,371.37 instead of $405,414.37. (R., 2, 3). That is to say, the transfer tax was computed upon the transfer of an estate of $530,371.37, although it is a conceded fact, as appears from the record, that the actual value of the estate transferred was but $405,414.37 (R., 8).

The total transfer tax imposed upon the transfer of the said estate, as above computed, equals $12,905.68 (R., 2, 3). Of this amount, the statute requires that the sum of $3,271.91 (representing the tax on that portion of the estate transferred by the decedent to the general and specific legatees and to his widow, including her aliquot share thereof as life beneficiary), be paid in cash within eighteen months from the decedent's death, to the State Tax Commission, and by the latter to the State Treasurer. (Sects. 222, 241).

The balance of said tax, viz. $9,633.77, representing the tax upon the transfer of the "balance" of the estate (fictitiously inflated as above explained), must be deposited within the same period of eighteen months with the State Tax Commission, either in cash or securities acceptable to said Commission and must be retained by the latter until the death of the life tenant, as security for the payment at that time, of the said balance of tax, (subject to an adjustment as to rate, as explained in the

footnote*), the income thereon in the meanwhile being paid back to the estate. Upon the death of the life tenant the said State Tax Commission, pursuant to the provisions of said Statute, will pay the said balance of tax (subject to said adjustment) to the State Treasurer out of the said security, or out of such other cash as the estate may then furnish for that purpose, thereby releasing the said security. (Sects. 222, 230, 241).

The reason for the above explanation will presently appear, (see pg. 12), but for the sake of clarity we should point out here that the tax involved and the auxiliary provision requiring the giving of security for its payment, are concededly vital parts of a single scheme and were so treated by the courts below (R., 37, 46); so that no question of severability is presented. (*Oklahoma* v. *Wells Fargo*, 223 U. S. 298).

From the assessment of the tax made by the Surrogate as a tax officer, as above explained, an appeal was taken to the Surrogate in his judicial capacity, on the ground, among others, that the Statute and the action of the Surrogate as a tax officer thereunder, was contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States. (R., 5). The said appeal having been decided against the estate (R., 2), an appeal was taken from such decision, to the Appellate Division of the New York Supreme Court before

*NOTE. As has been already explained, the New York Transfer Tax varies as to rate according to the relationship of the beneficiary to the deceased, and the amount received by such beneficiary. Therefore, in the case of a contingent remainder the tax cannot be definitely computed until the remainders become vested. The statute thus provides that the assessment in the first instance shall be made on the basis of the maximum rate that would apply to such contingent remainder under any possible contingency. Thus, in the present case, in arriving at such maximum rate it was assumed that two of the testator's three children had predeceased the life beneficiary, thus giving the *entire* remainder to one of the children, and consequently bringing the larger portion of the estate into the higher bracket. We are not challenging that feature of the law. When the life estate terminates, and the remainder becomes vested, the applicable rate will be corrected on the basis of the actual conditions as they then exist; but the arbitrary value ascribed to the remainder interest itself by the said Appraiser, and by the said order assessing the tax, will not be disturbed.

which the constitutional objections hereinbefore mentioned, were likewise urged. (R., 45). The Appellate Division affirmed the order appealed from, whereupon an appeal was taken to the Court of Appeals on the same grounds, which appeal was likewise decided against the plaintiffs in error. (R., 60). In accordance with the New York practice, the Court of Appeals after rendering its decision, remitted all the papers in the proceeding to the Surrogates' Court, of New York County, which thereupon entered the final order of affirmance in accordance with the mandate of the Court of Appeals. (R., 47). Such final order bears date December 15, 1927. Subsequently, on February 7, 1928, a petition for Writ of Error was presented to Honorable Benjamin N. Cardozo, Chief Judge of the Court of Appeals, who on the same date allowed the same.

Assignments of Error.

There are ten assignments of error printed on pages 52 to 54 of the Record, all of which are intended to be urged, but the general language of the first of these really comprises the more specific errors assigned in the others. Said first assignment reads as follows:

> "That the court erred in holding that Chapter 144 of the Laws of 1925 of the State of New York, being an act entitled 'An Act to Amend the Tax Law in Relation to the Transfer Tax on Contingent Remainders', approved March 16, 1925, and Article 10 of the Tax Law of said State, in so far as it is amended by said Act, are constitutional, and are not in conflict with or in violation of Section (1) of the Fourteenth Amendment to the Constitution of the United States, and particularly that portion of Section (1) of said Fourteenth Amendment which reads as follows: 'Nor shall any state deprive any person of life, liberty or property without due process of law,' or that portion of Section (1) of said Fourteenth Amendment which reads as follows: 'Nor (shall any

state) deny to any person within its jurisdiction the equal protection of the laws.' "

ARGUMENT.

I.

The New York Transfer Tax Law and the Amendment to Sections 230 and 241 thereof Made by Chapter 144 of the Laws of 1925.

(Printed in Appendix submitted herewith under separate cover)

The New York transfer tax is one upon the transfer of property from the deceased, at rates graduated according to the amount transferred to each beneficiary, and the relationship or absence thereof between the deceased and beneficiary. (Sections 220 and 243 New York Tax Law.) It is similar in nature to the Federal estate tax (*Keith* v. *Johnson*, 271 U. S. 1; *Home Trust Company* v. *Law*, 236 N. Y. 607, affirming 204 App. Div. 590), which has been defined as one "upon the transfer of his net estate by decedent;" (*Edwards* v. *Slocum*, 264 U. S. 61, 62).

Matter of Hazard, 228 N. Y. 26, 31, explains the nature of the New York transfer tax as follows:

> "Taxable transfers are defined by article X of the Tax Law. It is there stated that a tax shall be imposed upon the transfer by Will or the intestate laws of any property from a person seized and possessed thereof to the persons mentioned in the Statute. *The tax is upon the clear market value of the property possessed at the time of death. It is due and payable at the time of the transfer which is also the time of death.* The amount of the tax is not affected by an increase or decrease in the value of the estate between the date of death and its subsequent distribution." (Italics ours.)

Matter of Hubbard, 234 N. Y. 175; *Matter of White*, 208 N. Y. 64, 67.

Since the rate varies with the relationship of the beneficiary to the deceased and the amount transferred to the former, it is necessary in computing the tax to determine the aliquot share of each beneficiary in the estate. If life estates and remainders are created, the respective aliquot shares in the estate, of the beneficiaries entitled thereto are fixed by reference to the mortality tables. (Sect. 230, par. 3). In practice the value of the life estate is first determined according to the designated tables of mortality, and the value of the remainder is then ascertained by deducting from the aggregate amount of the fund the value of the precedent estate (*Matter of Zborowski*, 213 N. Y. 109, 113). This is but a practical working method of arriving at substantially the same result as that obtained by valuing the life estate and remainder as separate interests according to the mortality tables (*Wolf's Inheritance Tax Calculations*, pages 39, 40).

Prior to the enactment of Chapter 144 of the Laws of 1925 the above described method of ascertaining the respective aliquot shares of the life beneficiary and remainderman in the decedent's estate was followed in all cases, that is to say, it was applied whether the remainder was vested or contingent (*Matter of Parker*, 226 N. Y. 260, 265). Chapter 144 of the Laws of 1925 (which became effective on March 16, 1925) continues that method of apportionment in cases where the remainder is absolutely and indefeasibly vested. For cases, however, where the remainder is not absolutely and indefeasibly vested (such remainders being referred to for convenience as "contingent" remainders) the said Chapter 144 of the Laws of 1925 prescribes a different treatment. Under that chapter the aliquot share of the estate transferred to the life beneficiary is first determined, as theretofore, by reference to the mortality tables, and is treated as having been transferred to such life beneficiary outright, and taxed accordingly. (R., 3). But the amount thus taxed as having been transferred

outright to the life beneficiary is not deducted from the aggregate amount of the fund which is subject to such life estate,—but the whole aggregate fund on the date of the decedent's death is taxed again as though it were not subject to a life estate at all, and as though it had been bequeathed outright to the remainderman. (R., 10).

As a consequence of the foregoing, the Statute in practical operation produces the following results:

(1) The tax upon the transfer by the decedent of his estate is measured by more property than the decedent ever transferred.

(2) The same portion of the decedent's estate is taxed *twice* as having been the subject of *two* separate transfers out of the decedent, although in the nature of things only one such transfer is possible.

(3) The aggregate value of the shares of the beneficiaries in the estate of the decedent is arbitrarily fixed at a sum in excess of the value of the whole estate.

(4) The amount upon which the tax is computed is a purely fictitious item.

(5) The burden of the tax is arbitrarily distributed among estates within the same class. This is shown graphically by the tables printed on page 28 hereof.

(6) Since, as we shall presently explain, the supposed justification for the tax is that a portion of it represents and is collected in lieu of "interest", the result is that such "interest" is computed and the payment thereof exacted without reference whatever to the actual period of time during which the State has been deprived of the tax.

It is our contention that because of the foregoing results the tax in question violates the Fourteenth Amendment to the Federal Constitution.

One feature of the statute requires further notice. As explained on page 7 of this brief, that portion of the tax which is assessed in respect of the transfer of that part of the decedent's estate which is deemed to have

been transferred by him to the life-tenant and the general and specific legatees, must be paid in cash within 18 months of the decedent's death, to the State Tax Commission and by the latter to the State Treasurer to be applied towards the expenses of the State Government as appropriated from time to time by the Legislature. (Sects. 222, 223, 241, 242). The balance of the tax, however, viz. that portion of it which is assessed in respect of the transfer of that part of the decedent's estate which is deemed to have been transferred by him to the remaindermen, must be deposited within the same period of 18 months with the State Tax Commission, either in cash or securities acceptable to it, and must be retained by the said Commission until the death of the life-tenant, as security for the payment at that time of such balance of tax (subject to an adjustment as to rate as explained in the footnote on page 8), the income meanwhile accruing thereon being paid back to the Estate. Upon the death of the life tenant, the said Tax Commission pays over the said balance of the tax (subject to said adjustment) to the State Treasurer to be applied toward the expenses of the State Government, such payment being made either out of the said security or out of such other cash as the Estate may then furnish for that purpose, thereby releasing the security.

It was because of this feature of the Statute that the courts below sustained the validity of the tax thereby imposed (R., 46, 37), in effect basing their decision upon the following mathematical formula which we quote from the opinion rendered by the Appellate Division (R., 46—the Court of Appeals rendered no opinion):

> "There is no difference between taxing a contingent remainder on the assessment of its present worth, with a tax payable presently, and taxing it, with a tax payable at the date of vesting, on its face value rather than its present worth. One is the exact arithmetical equivalent of the other."

We raise first of all the question as to whether in such an eminently practical matter as taxation (*Nicol* v. *Aimes*, 173 U. S. 509, 516) results so actual and real as those produced by the tax here involved, may be effectively disguised, and important constitutional limitations rendered nugatory by resort to a purely theoretical mathematical formula. "Taxes are very real things and statutes imposing them are estimated by practical results", said this Court in *Nichols* v. *Coolidge*, supra, 801.

That arithmetical formula moreover, far from disproving the existence of the arbitrary results enumerated on page 12 of this brief, serves rather to demonstrate that such results are brought about by the challenged statute, not only as a matter of actual fact, but as a matter of mathematical theory as well. For in order to hold true the formula requires—

> 1st—That the *rate* at which the tax on the future worth of the remainder is computed, shall be the *same* as that which would apply if such tax were calculated on the remainder's present worth.
>
> 2nd—That the period of time during which the payment of the tax is postponed, shall be the *same* as that by reference to which the respective values of the life estate and of the remainder subject thereto, are fixed.

The statute fails to adhere to the suggested formula by arbitrarily ignoring both of these essential requirements. *First*, since the tax imposed by said statute is a *graduated* one, the applicable rates on the present and future worth of the remainder will generally be different. The increase in the amount on which the tax is computed increases the rate of tax. In all such cases (and the present is one of them), the arithmetical formula referred to, will not apply. *Secondly*, the statute postpones the payment of the tax by reference to the life tenant's actual duration of life and wholly ignores in that connection the period of time representing the life tenant's expectancy. (Sections 230, 241). On the other

hand, in fixing the worth of the life estate and of the remainder subject thereto, the statute in all cases ignores completely the life tenant's actual duration of life and determines such worth by reference to the life tenant's expectancy according to the Mortality Tables. (*Matter of White*, 208 N. Y. 64; third paragraph Section 230). Since in the overwhelming majority of cases these two periods, viz. the life tenant's expectancy and his actual duration of life, do not coincide, it is clear that in all such cases the mathematical formula relied on by the Court below is not applicable. And that such is the case almost universally, and not merely occasionally or accidentally, may be readily seen by reference to the Mortality Tables themselves. For example, according to the American Experience Tables of Mortality in use in New York (Gleason & Otis on Inheritance Taxation p. 525) the expectancy of life of a person 10 years old is approximately 49 years, yet, out of 100,000 average persons of that age less than 1½% (1,468) actually die at the end of 49 years.

While we may assume that the Legislature might reasonably have chosen either the life tenant's expectancy or his actual duration of life, as the period by reference to which both the postponement of the tax was to be made and the worth of the life estate and remainder determined, we submit that such a selection under a tax scheme such as that here involved, may only be deemed rasonable if it is adhered to *for both purposes*. If so adhered to, the result (in theory, at least) would never be to tax more property than the decedent transferred; if not adhered to, the result, both in fact and in theory, will always be the taxation of more property than was transferred by the decedent.

It is precisely this latter result which we contend renders the Legislature's action unreasonable and arbitrary and hence violative of the Fourteenth Amendment.

Thus, it seems to us that the formula invoked by the Court below serves rather to condemn than to justify, the challenged statute. It formulates a theory which if ad-

hered to in the framing of the statute would have accomplished the object that the Legislature had in view, while at the same time avoiding the arbitrary and whimsical results which the statute in its present form unquestionably produces. The Legislature by failing to adhere to the said theory has robbed the tax scheme of whatever reasonable basis it otherwise might have had. Instead of explaining away the results of which we complain, the formula referred to, we submit, establishes conclusively their capricious origin.

But there was still another simple method by which the Legislature could have achieved its purpose without producing the arbitrary and bizarre results of which we are complaining. That purpose was to reimburse the State for the loss of interest on that portion of the transfer tax, the payment of which was postponed. Such purpose might have been readily attained by the simple and obvious expedient of requiring the estate to pay interest on the postponed tax.

A brief sketch of the practice which prevailed prior to the enactment of the statute here in question may prove helpful. Formerly the original order assessing the tax in cases where there were contingent remainders, fixed both the minimum and the maximum tax upon the transfer of that part of the decedent's estate represented by the contingent remainder. (R., 40 and former Sects. 230, 241). The remainder in all cases, as the life estate upon which it was dependent, was valued according to the Mortality Tables as of the date of the decedent's death. The estate was required to pay the minimum tax forthwith to the State Tax Commission, which in turn paid it over to the State Treasurer. However, the difference between the minimum and the maximum tax was required to be deposited either in cash or securities with the State Tax Commission as security for the ultimate payment of the balance of the tax found to be due, the income on the amount thus deposited being meanwhile paid back to the estate. When the life tenancy terminated there was

a recomputation of the tax upon the contingent remainder (at its value on the date of the decedent's death, as theretofore fixed), according to the rates which were found to be applicable, and thereupon the difference between the minimum tax as theretofore determined and paid, and the tax on the contingent remainder as finally fixed, was required to be paid to the State Treasurer.

The State, however, did not exact any interest on that portion of the tax the payment of which had been postponed, as above explained. Of course, if the tax found to be due as finally fixed happened to be the same as the minimum tax, no injustice was done to the State. Obviously, in most cases the amount of the tax as finally fixed would be somewhere between the minimum and the maximum tax, and accordingly the State lost interest on that portion of the tax the payment of which had been postponed, as above explained.

This situation might have been readily remedied by the simple expedient of charging interest on that portion of the tax, the payment of which was postponed. Since that portion of the tax was not payable until the death of the life tenant, the actual time during which such payment had been postponed would necessarily be then known. By computing and requiring the estate to pay interest on the postponed tax on the basis of the actual time during which the estate had had the use of the money in question, and accordingly during which the State had been deprived of that use, full justice both to the State and the taxpayer might readily have been done. Thus, it will be seen that the problem presented was one that was susceptible of an easy and simple solution. Instead of adopting such a solution, however, the novel tax scheme here involved was enacted, which, it is true, will make the State whole so far as the loss of interest is concerned, but will do this by means of the unreasonable, whimsical and arbitrary results that we have already enumerated on page 12 of this brief, which results, we contend, bring the said tax scheme into conflict with the Fourteenth Amendment to the Federal Constitution.

II.

The challenged statute is in conflict with the 14th Amendment to the U. S. Constitution for the reasons set forth under this caption.

(1) Because the tax thereby imposed upon the transfer by the decedent of his estate is measured by more property than the decedent ever transferred;

(2) Because the same portion of the decedent's estate is taxed twice as having been the subject of two separate transfers out of the decedent, although only one such transfer is possible;

(3) Because the Statute arbitrarily disregards the fact that the aggregate value of a life estate in a given fund and of the remainder subject thereto, cannot, in the nature of things, exceed the value of the whole fund.

(4) Because the tax thereby imposed is computed on a purely fictitious amount.

(5) Because the tax thereby imposed is discriminatory; and

(6) Because in effect the statute exacts the payment of interest on a tax without reference whatever to the actual time during which the payment thereof has been postponed.

(1) (a) The State may not impose a transfer tax measured by more property than was actually transferred by the deceased.

Schlesinger v. *Wisconsin*, 270 U. S. 230; *Nichols* v. *Coolidge*, 274 U. S. 531; *Frew* v. *Bowers*, 12 F. (2nd) 625;

Knowlton v. *Moore*, 178 U. S. 41, 77; *Wachovia Bank and Trust Company* v. *Doughton*, 272 U. S. 567; *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69; *Frick* v. *Pennsylvania*, 268 U. S. 473; *Lewellyn* v. *Frick*, 268 U. S. 238.

The New York transfer tax is similar in nature to the Federal estate tax (*Keith* v. *Johnson*, 271 U. S. 1; *Home Trust Company* v. *Law*, 204 App. Div. 590, affirmed 236 N. Y. 607) which has been defined as one "upon transfer of his net estate by decedent" (*Edwards* v. *Slocum*, 264 U. S. 61, 62); although the New York tax, as already explained, is imposed at rates graduated according to the amount transferred to each beneficiary and the relationship or absence thereof between the deceased and beneficiary.

The tax itself purports to be imposed upon the clear market value of the property at the time of the transfer, which is the date of the decedent's death (*Matter of Hubbard*, 234 N. Y. 175, 179; *Matter of Hazard*, 228 N. Y. 26, 31; *Matter of Penfold*, 216 N. Y. 163; *Matter of White*, 208 N. Y. 64; Sections 243, 220 subdivision 6, of New York Tax Law).

From the very nature of such a tax it follows that it may not be imposed upon more property than was actually the subject of transfer. Since the incidence of the tax is upon the transfer of the property from the deceased, it is evident that unless such a transfer has in fact taken place, there is nothing upon which the tax can operate. The necessary basis of fact which brings both the tax and the peculiar taxing power into operation, does not exist.

Nor, we submit, may a valid distinction be drawn between imposing a transfer tax when no transfer whatever has taken place, and imposing such a tax upon a particular transfer of specific property but measuring such tax by other property which was not in fact included

in the transfer. And this for two reasons, viz.: (a) because that would be a palpable effort to impose a tax upon a transfer of property which has not in fact taken place (*Frew* v. *Bowers, supra*); and (b), because were it otherwise, the way would be open for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail (*Frick* v. *Pennsylvania*, 268 U. S. 473, 494; *Nichols* v. *Coolidge*, 274 U. S. 531, 541).

Frew v. *Bowers, supra*, at page 628 says:

> "Further, a tax on a transfer by A, but measured by anything other than the estate of A, may be a duty or excise in form, but it is a palpable effort to tax something other than the transfer."

And again at 626:

> "We next inquire as to the nature, or at least as to the presently material attributes, of the property whose transmission gives rise to this indirect tax—this duty or excise. It is and must be the property of the decedent whose estate bears the incidence of tax. No estate, no tax, said White, C. J., in substance, in *Knowlton* v. *Moore, supra* • • • "

Similarly, in *Wardell* v. *Blum*, 276 Fed. 226, 227:

> "All inheritance taxes are imposed on the transfer of the net estate of the deceased; from which the conclusion is inevitable that the property upon which such a tax is imposed, must in truth, be the property of the deceased."

Lewellyn v. *Frick*, 268 U. S. 238, at 251:

> "There would be another (serious question) if the provisions for the liability of beneficiaries were held to be separable and it was proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer."

And finally, in *Nichols* v. *Coolidge, supra,* at page 541, it is said:

> "Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them."

The recent cases of *Frick* v. *Pennsylvania, supra,* and *Schlesinger* v. *Wisconsin, supra,* seem to us to be directly in point. For if the State is prohibited by the Constitution from measuring such a tax by property situated beyond its jurisdiction (and which, therefore, so far as such State is concerned, has not been the subject of a taxable transfer), and if the State is likewise prohibited by the Constitution from measuring such a tax by property which has not been the subject of any testamentary transfer at all, because it was in fact transferred by the decedent prior to his death by an act which was not of a testamentary character, then *a fortiori* the State may not measure such a tax by reference to property which the decedent never owned and accordingly never transferred at any time or place whatever.

(1) (b) There can be no question that the practical operation of the challenged tax scheme is to impose a transfer tax upon more property than was transferred by the deceased.

That this is so, as a matter of actual fact, is self-evident. In fact, under the Statute as construed by the New York Courts, the fictitious multiplication of the estate may go on indefinitely, because where there are successive life estates each of them is valued at its full value according to the Mortality Tables without regard to the preceding life estates (*Matter of Hosford,* 129 Misc. 825; *Matter of Blumenthal,* N. Y. Law Journal, February 11,

1928, Vol. 78, p. 2320; *Matter of Potter*, 130 Misc. 312; *Matter of Payne*, N. Y. Law Journal, January 31, 1928, Vol. 78, p. 2094; *Matter of Sperling*, N. Y. L. Jr. May 2nd, 1928, Vol. 79, p. 545).* Thus, if we assume an estate subject to three life tenancies, each of which if valued independently would equal 50% of the estate, the computation of the transfer tax on the transfer of the estate, would be made upon a fictitious amount equivalent to 250% of the actual estate, inasmuch as under the Statute, in addition to attributing 150% to the life estates, an additional 100% is attributed to the remainder.

As we have already shown, this fictitious multiplication of the estate cannot be explained away on the basis of the mathematical formula invoked by the court below (see p. 14 hereof).

(1) (c) The suggestion that the decedent transfers in addition to his whole estate, the income which the life tenant thereafter receives, is clearly without merit.

No matter how many different estates or interests the decedent may create by his Will, that is to say, no matter into how many parts the decedent may split up his full

*The procedure in cases of successive life estates is rather complicated. The value of the first life estate is fixed on the basis of the Mortality Tables as of the date of death of the decedent. The value of the second and subsequent life estates is determined in the first instance as of the date of the appraisal (which is usually about a year after the decedent's death), but each of these estates is valued as though it were not subject in any way to any precedent estate, and as though it had actually come into existence on the date of the appraisal. When the first life estate actually terminates, the value of the second life estate is fixed according to the Mortality Tables as of the date that the first life estate terminates, but no allowance is made in respect of the prior valuation of the first life estate. This same procedure would be followed in respect of the third or any further life estates that might exist. Thus it is evident that the life estate of each of the life tenants might actually vest in enjoyment as such life tenant reached the age of 40 years. For example, suppose that the first life tenant was 39 at the date of death, but died the subsequent year; that the second life tenant was 38 on the date of death, and came into possession of his life estate when he reached 40, and thereupon lived five years, and that the third life tenant being 34 on the date of death, actually came into possession of his life estate at the age of 40. Thus assuming that these three life estates are each worth 50% of the fund, one would arrive at the result pointed out in the text.

100% ownership, it is clear that the total of these parts cannot exceed the whole estate which the decedent owned at his death. The right to receive the income of the estate for a given period is but part of the 100% ownership which was vested in the decedent. If this right to receive the income for a given period is taken from that 100% ownership, it is obvious that what remains is something less than said 100%. The right to receive income is but a mere incident or element of complete ownership. By giving this right to the life tenant for life and creating a remainder over, the deceased has merely divided into two parts his complete 100% ownership and has transferred each part to a different person.

The fact that at the termination of the life tenancy the amount of the fund remains the same as on the date of death (assuming, of course, that there has been no capital gain or loss), when viewed superficially might lead one to believe that the property transferred by the decedent to the life tenant (in this case $124,957.) has not diminished the total property passing upon the death of the deceased; but this, of course, is not so. In the nature of things the decedent cannot transfer more than what he has.

Now, what is it that the State actually does when it fixes the aliquot share of the life tenant in the decedent's estate, by reference to the mortality tables? It determines what amount of the testator's whole estate will, together with the future interest accruing on such amount, be sufficient to pay to the life tenant an annuity during the balance of his life (according to the mortality tables), equal to five per cent per annum on the entire fund. In the present case, for example, the entire fund equals $322,094.37. Five per cent per annum thereon would equal $16,104.72. The value of the widow's life estate equals $124,957. This means that the last mentioned amount, together with the interest thereon at the

rate of five per cent per annum would be sufficient to pay to the widow an annuity of $16,104.72 during the period of 11.68 years, that is, her expectancy of life according to the mortality tables. The state, therefore, determines that the widow's share in the estate of the decedent is the equivalent of an outright legacy to her of $124,957. and, therefore, imposes a tax upon the transfer to her of her life estate in exactly the same manner as though a general legacy had been bequeathed to her of $124,957.

Accordingly, the balance of the estate is necessarily $197,137.37. It is the interest* accruing on this balance during the said period of 11.68 years (the life tenant's expectancy of life) which makes good the depletion of the trust fund caused by the setting aside of the sum of $124,957. for the life tenant.

Of course, what actually happens is that the fund remains intact and the life tenant receives the entire income thereon for life. But the theory of this is that the remainderman contributes to the life tenant the interest on the former's $197,137.37 in exchange for the life tenant's leaving the principal of her $124,957. in the fund itself. Thus, if the life tenant dies before her theoretical expectancy, it simply means that the remainderman has gotten the best of this bargain. The amount which it was estimated would be required to satisfy the life estate given to the life tenant, namely $124,957., proves to be excessive and accordingly the estimated value of the remainder proves to be too low. But this obviously in no way affects the total value of the fund itself, nor does it increase in any way the amount which the decedent transferred at the time of his death.

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*Note. The decedent obviously does not transfer this interest in addition to the $197,137.37. The sum of $197,137.37 which the decedent transfers at his death necessarily includes within it, the interest which that sum is thereafter capable of earning. And since the state does not as a matter of fact postpone the collection of the tax until the end of the period representing the life tenant's theoretical expectancy, it cannot correctly be said that the state converts the said sum of $197,137.37 into what would be its theoretical equivalent, if the payment of the tax were actually postponed during such period.

(2) *Under the challenged statute the State of New York attempts to assess, levy and collect two transfer taxes upon one and the same item of property as though the same had been the subject of two distinct transfers from the deceased to two distinct beneficiaries.*

It is obvious that there can be but one transfer out of the decedent of all of the property which he owned at his death. This is true both as to the whole and each of the parts. In the nature of things each item of property constituting the decedent's estate, and each interest, right and estate of the decedent therein can be the subject of but one such transfer. Since the incidence of the tax is upon the transfer or the passing of the property from and out of the decedent, it is evident that unless such transfer or passage has actually taken place there is nothing upon which the tax can operate. On the other hand, once the transfer or passage has been completed, thus bringing the tax into operation simultaneously therewith, it is clear that as to such property the transfer or passage can never again be repeated. It has been transferred from and out of the decedent once and for all.

When the State of New York, as in the present case, sets aside out of the total estate of the decedent the sum of $124,957 as representing the portion of the decedent's estate which has been transferred by him to his widow and assesses, levies and collects a transfer tax upon such transfer, it has no power in the nature of things to subject that portion of the decedent's estate to any further tax upon the transfer thereof from the decedent, because no further transfer from the decedent of that particular portion of his estate is possible. If there was no transfer out of the decedent of the said $124,957 there could be no tax upon such transfer because it did not in fact take place. If, on the other hand, there was a transfer of said $124,957 out of the decedent and

a tax properly collected thereon, then obviously there can be no further transfer of the same property from the deceased.

We contend, therefore, that the State of New York may not treat this same portion of the testator's estate, to wit, $124,957, as having been transferred by him both to his widow and to the remainderman absolutely, and exact two transfer taxes thereon. We contend that this attempt to exact a *second* tax upon an alleged second transfer from the deceased which has never in fact taken place, is a violation of the Fourteenth Amendment to the Federal Constitution and beyond the power of the State.

(3) *The Statute arbitrarily disregards the fact that the aggregate value of a life estate in a given fund and of the remainder subject thereto, cannot in the nature of things exceed the value of the whole fund, since both are essentially but parts of that whole.*

Even a death tax statute must take the facts as it finds them. (*Schlesinger* v. *Wisconsin*, supra). Those interests in property which under our law are known as life estates and remainders are essentially but parts or portions of one entire ownership. If the testator divided his whole estate into three shares and gave one such share outright to a different legatee, no one would doubt the arbitrary and whimsical character of the Legislature's action in treating three thirds as being greater than the whole. We contend that it is no less arbitrary to treat the parts as being greater than the whole when the division is made horizontally rather than vertically.

> "Now here the estate of inheritance undergoes a division into three portions: There is first A's estate for years carved out of it; and after that B's estate for life; and then the whole that remains is limited to C and his heirs. And here

> also the first estate and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions in one entire inheritance; and if there were a hundred remainders it would still be the same thing; upon a principle grounded in mathematical truth, that all of the parts are equal and no more than equal to the whole (Blackstone's Commentaries, II, 163-165)."

The courts below endeavored to escape from the mathematical absurdity upon which the Statute is based, by means of a formula which we have explained on page 13 of this brief, but which, as we have there shown, *does not hold true* as applied to the actual provisions of said Statute.

(4) The amount upon which the tax is computed is a purely fictitious item.

It will be observed that the amount by reference to which the tax is computed, remains always fictitious. It is not the amount which passes to the remainderman on the death of the decedent, because at that time the fund in question is subject to one or more life estates. Neither is it the amount which passes to the remainderman on the termination of the preceding life estates, because the Statute does not concern itself in any way with the amount of the fund at that time.

Thus, the amount upon which the tax is computed neither represents the amount transferred by the decedent at his death, to the remainderman, nor the amount transferred to such remainderman at the death of the life tenant. It always remains a fictitious amount.

(5) The tax here involved is discriminatory.

We shall assume that the Legislature has power to place vested remainders and contingent remainders in different classes for the purposes of the tax imposed under the said Statute.

Our first contention under this head is that while the Legislature by the present Statute places all estates in which there are contingent remainders, in a single class, it fails nevertheless, to accord equal treatment to the members of that class, but without method or order, bears heavily upon some and lightly upon others. And this inequality is not merely occasional or accidental but it is inherent, fundamental, purposed and pervasive in the law itself. It is, moreover, the result of the Legislature's arbitrary action in prescribing that what is essentially a partial interest in a fund shall be deemed to be the equivalent of the whole fund, and this irrespective of how small or how large a part of that whole, the partial interest may be.

The inequalities thus resulting are shown graphically by the following tables:

Amount of Total Estate	*Age of Life Tenant*	*Value of Remainder*	*Tax on Remainder*
$500,000	10 Yrs.	$ 87,375	$16 750
500,000	23 Yrs.	106,600	16,750
500,000	56 Yrs.	247,625	16,750
500,000	94 Yrs.	496,598.75	16,750

Amount of Total Estate	*Age of Life Tenant*	*Total Tax on Transfer of Total Estate*
$500,000.	10 yrs.	$30,005.00
500,000.	23 yrs.	29,236.00
500,000.	56 yrs.	23,595.00
500,000.	94 yrs.	16,784.01

For the purpose of our illustration the facts and circumstances in all four cases mentioned in the tables must be deemed to be identical, except as therein stated.

It will be observed that in all four cases the burden of the tax bears a different relation to the value of the property transferred. In the first case in first table, for example, it is approximately 20%, whereas in the last case in the same table it is less than 4%.

In the second table we have included in the total tax on the transfer of the fund the transfer tax both on the transfer of the life estate and the transfer tax on the transfer of the remainder. This is in accordance with the rule laid down by the State courts in *Matter of Vanderbilt*, 172 N. Y. 69; *Matter of Tracey*, 179 N. Y. 501; *Matter of Lynch*, N. Y. Law Journal, August 5, 1927.

The foregoing inequalities, as we have already shown, may not be explained away by the mathematical formula invoked by the courts below (p. 14 hereof).

We contend, therefore, that because of the unequal treatment accorded to the members of the same class the said Statute violates the Fourteenth Amendment to the Constitution of the United States. (*Michigan Central Railroad Co.* v. *Powers*, 201 U. S. 245, 301; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 300; *Southern Railway* v. *Greene*, 216 U. S. 400, 417; *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Royster Guano Company* v. *Virginia*, 253 U. S. 412, 415; *Giozza* v. *Tiernan*, 148 U. S. 657, 662; *Keeney* v. *New York*, 222 U. S. 525; *Watson* v. *Comptroller*, 254 U. S. 122.)

No one will contend that it was the intention of the Legislature to establish subclassifications within the major class consisting of estates in which there are contingent remainders. This is made evident from the opinions delivered by the courts below. Such being the case we contend that the question of whether or not the Legislature might have lawfully made such subclassifications does not properly arise.

Assuming, however, that the Statute here involved must be deemed to establish such subclassifications within the major class itself, and that the unequal treatment accorded to constituents of that class is sought to be justified here on the ground of the existence of such subclassifications, then we respectfully submit that such attempted subclassifications are in conflict with and in

violation of the Fourteenth Amendment to the United States Constitution because not based upon grounds of difference having a reasonable and substantial relation to the object of the legislation. (*Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 U. S. 150, 165; *Southern Railway* v. *Greene*, 216 U. S. 400, 417; *Quaker City Cab* v. *Pennsylvania*, 48 S. Ct. 553; *Watson* v. *Comptroller, supra; Keeney* v. *New York, supra; Magoun* v. *Illinois Trust & Savings Bank, supra; Schlesinger* v. *Wisconsin, supra; Royster Guano Company* v. *Virginia, supra; Nichols* v. *Coolidge, supra; Frick* v. *Pennsylvania, supra.*)

The object of the Legislature was, of course, to impose a transfer tax upon the transfer by a decedent of his net estate at the moment of his death. The statute groups into one class decedents who by their wills create contingent remainders, and subjects that act to a certain toll or impost. The act itself of creating the contingent remainder is by its nature one and the same in all of the four cases mentioned in the above tables. Yet, that act in each of the four cases is subjected to burdens of taxation that differ fundamentally and not occasionally or in point of detail. No reasonable or substantial ground of difference between these four acts can be suggested, having in mind the purposes and objects of the legislation and the nature of the tax thereby imposed.

It has been suggested that the State will collect the tax in each case at a different time. Our hypothesis is otherwise. We have assumed that in the four cases the tax is collected by the State at the same moment.

It is then urged that the basis of the subclassification is the *possibility* that the State will not collect its full tax until the termination of the life tenant's theoretical expectancy according to the Mortality Tables. But we respectfully submit that such a possibility furnishes no reasonable measure of a transfer tax such as that im-

posed by the present Statute. The tax involved is not one upon the use of property by the estate or its beneficiaries. As already pointed out, it is a tax upon the transfer of the property from the deceased which takes place at the moment of his death. To measure such a tax by reference not to the value of the estate transferred, but to the time during which the payment of a portion of the tax may be postponed, or in other words, by reference to the period of time during which the estate and its beneficiaries may enjoy the use of such postponed tax, is wholly arbitrary. The period of time during which the payment of a portion of the transfer tax may possibly be postponed is entirely unrelated to the amount of property which the decedent transferred. The tax is not one against the estate *on the use of the money representing the postponed tax.*

We claim furthermore, that it is arbitrary to refer to the said *possibility* as the measure of the transfer tax inasmuch as the actual time during which the estate has had the use of the money representing the postponed tax will necessarily be known at the date that the tax itself becomes payable, the situation presented, being essentially different from that which arises when the present value of an existing life estate is determined by reference to the Mortality Tables. This phase of the matter is more fully discussed under the head marked "(6-a)".

(6) (a) *Under the tax scheme in question an amount is exacted by way of interest which is computed without reference whatever to the actual time during which the payment of the tax has been postponed.*

As we have already explained, the purpose of the tax scheme which we are here considering was to compen-

sate the state for the loss of interest which it sustained by reason of the postponed payment of the tax on the transfer to the contingent remainderman. A brief sketch of the former practice which prevailed in New York in such cases will be found on page 16 of this brief.

What the state does in effect under the present statute is to compute the "interest" which the taxpayer is required to pay, on the basis of the mortality tables,—after the actual time during which the payment of the tax has been postponed is fully known. The theory seems to be that the tax computed upon the true value of the remainder on the date of the decedent's death, increased by the interest deemed to accrue thereon during the period of the life tenant's theoretical expectancy, will equal the amount of tax computed according to the method prescribed by the challenged statute. Of course, as the rates in both cases are different, the proposition just stated is not mathematically correct. But apart from that, it is evident that this is nothing more or less than charging interest to the taxpayer on the basis of the mortality tables, *after the actual time during which the payment of the tax has been postponed*, is fully known. We do not question the right of the state to fix the security which it will require for the payment of such interest, by reference to the tables. At the time that the security is required the facts are unknown, and to resort to the mortality tables is undoubtedly necessary and proper. But after the life tenant has died and the time for the payment of the tax has thus arrived, the state is in possession of all of the necessary facts in order to enable it to compute accurately the amount of interest due. Under such circumstances, to resort to the mortality tables *ex post facto* and after every element of futurity and uncertainty has been eliminated, is, we submit, purely arbitrary and capricious.

Thus, under the present statute, the amount of the so-called "interest" charged in each concrete case "is fixed by the mere sport of fortune". (*Frew* v. *Bowers*,

supra, page 630). It is unwarrantably large or unwarrantably small, accordingly, as the life tenant meets a premature death or outlives his theoretical expectancy. Actually what the state does is to charge one taxpayer for the use of the money which another taxpayer is enjoying without charge. This is in effect taxing one person for the benefit of another person. It is not taxation for the benefit of the state because the state gets no more than it gives. It loses the use of the money which taxpayer A is enjoying, and it requires taxpayer B to compensate the state for that loss.

(6) (b) *The suggestion that the results produced by the present statute are not more objectionable than those which ordinarily occur when a life tenant fails to survive his theoretical expectancy, is without merit.*

The difference between the use which is ordinarily made of the mortality tables and the use which is attempted to be made of them in this case is this, that in the former case no matter whether the life tenant survives or fails to survive his theoretical expectancy, the state never measures the tax by more property than was actually transferred. The failure of the life tenant to survive his theoretical expectancy merely affects the rate of tax. There is no injustice in this, because the state if it chose might tax the transfer of the fund as a whole (without apportioning it between the life tenant and the remainderman) at a flat rate. In making such apportionment between life tenant and remainderman and graduating the tax according to their respective relationships to the deceased, the state is really making a concession to the estate in the interest of a more equitable distribution of the tax. In view of the fact that at the time the tax becomes payable the apportionment cannot be made with strict accuracy (since the actual

duration of the life tenant's life cannot be foretold), it would seem clear that any reasonable method of making such apportionment would be approved of by this court, and no better method can be suggested than that of resorting to the mortality tables under such circumstances. If the actual duration of life of the life tenant proves to be less than his theoretical expectancy, the result is not unfair to the estate viewed as a taxable entity because what it has overpaid in respect of the share of the life tenant it has underpaid in respect of the remainderman's share, and one should substantially offset the other. Such use of the mortality tables does not produce the objectionable results enumerated on page 18 of this brief, which are unquestionably effected by the present statute.

III.

The postponement of collection of a portion of the tax is immaterial, if, as we contend, the State lacks constitutional power to measure a transfer tax by more property than is the subject of transfer.

If the constitutional power to impose such a tax is wanting, it obviously can make no difference whether the State attempts to exact payment of such a tax forthwith or at some later date.

The postponement of the time of payment can only bear upon the question of fact involved. As already explained, the court below by invoking a theoretical arithmetical formula based upon the period of such postponement, reached the conclusion that the tax *theoretically* was not measured by more property than was the subject of transfer. We have shown, however, that that formula is not adhered to by the present statute (pg. 14) and is therefore inapplicable.

CONCLUSION.

For the foregoing reasons the judgment of the Court below should be reversed.

Respectfully submitted,

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Counsel for Plaintiffs-in-Error.

EDMUND O. AUSTIN,
Of counsel.

[redacted]

Supreme Court of the United States

October Term, 1919

No. 98.

[redacted]

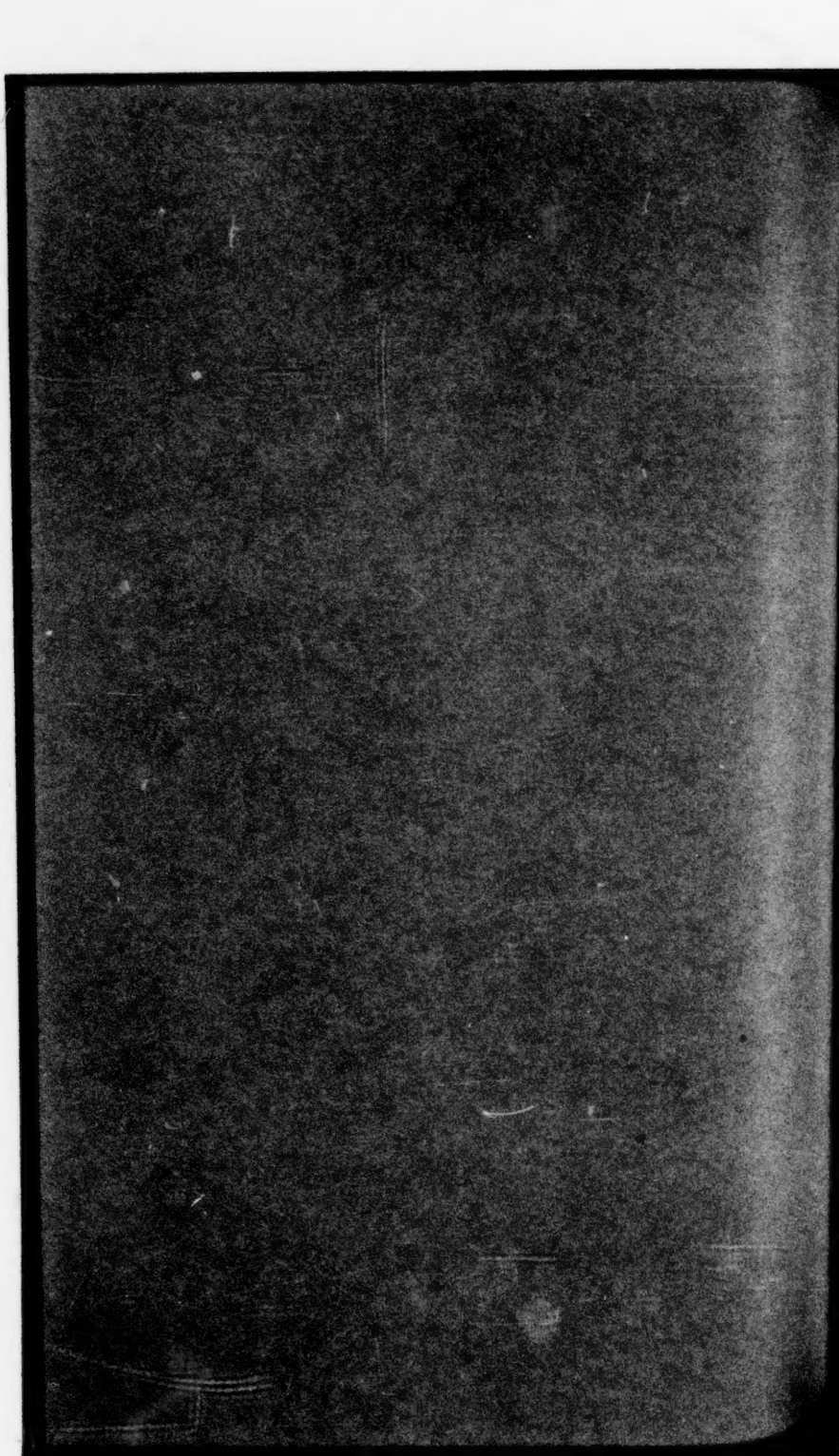
vs.

[redacted]

BRIEF FOR PLAINTIFFS-IN-ERROR.

ABRAHAM L. GUTMAN,
Counsel for Plaintiffs-in-Error.

Wm. Tyson Cummings,
of Counsel.



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Supreme Court of the United States

OCTOBER TERM, 1928.

NETTIE L. SIMONSON, ETTIE B. SIMONSON and FARMERS' LOAN AND TRUST COMPANY, etc., Plaintiffs in Error vs. STATE TAX COMMISSION OF NEW YORK, in error to the Surrogates' Court of New York County, State of New York.	No. 80.

BRIEF FOR PLAINTIFFS-IN-ERROR.

This case involves the constitutionality of Section 230 of the New York Transfer Tax Law as amended by Chapter 144 of the Laws of 1925, in so far as the same requires the valuation of contingent remainders for transfer tax purposes at a value in excess of the actual value of the interest transferred.

THE OPINIONS BELOW.

The Surrogate of New York County denied the original appeal herein without opinion on the authority of *Matter of Hecht*, 127 Misc. 211. New York Law Journal, October 9th, 1926 (R. 31). The opinion of the Appellate Division in affirming is reported at 219 App. Div. 656 (R. 36). The Court of Appeals affirmed without opinion, 246 N. Y. 601.

THE JURISDICTION OF THIS COURT.

This proceeding originated in an appeal to the Surrogate of New York County (R. 5) from the order (R. 5),

entered pursuant to Section 230 of the New York Tax Law, assessing a transfer tax on the Estate of Albert Simonson, deceased, and from the appraisal on which said order was based. The grounds of the appeal were that the taxation of the transfer of certain remainders was in violation of the Constitutions of the United States and the State of New York.

The appeal was denied by the Surrogate (R. 4), whose determination that there was no violation of the constitutional rights relied on was affirmed successively by the Appellate Division (R. 32, 36, 38-39) and the Court of Appeals (R. 2), the highest court of the state. On the remittitur or mandate of the Court of Appeals (R. 2) its judgment was made the judgment or decree of the Surrogates' Court (R. 40).

There is thus involved a judgment or decree of the highest court of the State of New York in which a decision could be had, in which was drawn in question the validity of a statute on the ground of its being repugnant to the Constitution of the United States, the decision being in favor of its validity.

The judgment or decree was final.

(a) *The judgment or decree appealed from finally determines the particular cause in litigation.* Appeals have been taken to the highest courts in the state. There are no other avenues open to plaintiffs in error along which to seek further relief. Their rights under the taxing order complained of are fixed. There is no suggestion of any further steps to be taken to conclude this special proceeding determining the tax involved in this appeal. The judgment or decree is, therefore, final.

Weston et al. v. The City Council of Charleston, 2 Pet. 449, at p. 464.

Detroit &c. Ry. v. Michigan R. R. Comm., 240 U. S. 564, at p. 571.

Holmes v. Jennison et al., 14 Pet. 540, at p. 563.

(b) *The judgment or decree is final according to the law and practice of the State of New York.* The New York Civil Practice Act, Section 588, subdivision 1, provides that an appeal may be taken to the Court of Appeals as of right from a judgment or order entered upon the decision of an Appellate Division of the Supreme Court "which finally determines an action or special proceeding wherein is directly involved the construction of the Constitution of the State or of the United States." The other two cases in which an appeal may be taken as of right are clearly not applicable to the present proceeding.

The appeal herein to the New York Court of Appeals was taken as of right (R. 34, fol. 52). It is true that by way of precaution, an appeal was also taken pursuant to leave granted by the Appellate Division (R. 34, fol. 50; R. 33). That this was entirely unnecessary, however, appears clearly from the record in the companion case of *Salomon et al. v. State Tax Commission*, which is being presented simultaneously with this case. In the *Salomon* case, an appeal only as of right was taken, and that case, involving precisely the same questions as this and wherein the same procedure was followed throughout, was presented to the New York courts together with this case and the two cases were argued as one throughout (219 App. Div. 656, *sub nom. Matter of Hecht*; 246 N. Y. 601, 602). This determination by the highest court of New York that the judgment or decree herein is a final one is binding on this court.

> *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, at p. 290.

See also:

> *Brinkmeier v. Missouri P. R. Co.*, 224 U. S. 268, at p. 270.
>
> *Lee v. Central of Georgia R. Co.*, 252 U. S. 109, at p. 110.
>
> *Texas & N. O. R. Co. v. Miller*, 221 U. S. 408, at p. 416.

(c) *The fact that the order is denominated a "temporary" one by the statute does not affect its finality for jurisdictional purposes.* It may be contended that there is no finality here because Section 230 of the New York Tax Law states that where there is a contingent transfer the taxing order entered by the Surrogate shall be a "temporary" one. However, what is objected to is the valuation of the remainder of the trusts for taxation purposes at the value of the corpus of the trust estates undiminished by the preceding life estates (R. 6). *That valuation is fixed for all time.* The taxing order is "temporary" only in that it may be modified at the termination of the life estates as to *rate* of tax (New York Tax Law, Sec. 230). The question of *rate* of tax is not involved; the question of *value*, which is involved, has been finally determined. Similar objections to the finality of a judgment or decree under review by this court have been uniformly disregarded.

Weston et al. v. The City Council of Charleston, *supra*, at p. 464.

Detroit &c. Ry. v. Michigan R. R. Comm., *supra*, at pp. 570-571.

Commissioners, etc. v. Lucas, Treasurer, 93 U. S. 108, at pp. 113-114.

Moreover, similar taxing orders were involved in the cases of *Wheeler v. Sohmer*, 233 U. S. 434, and *Watson v. State Comptroller*, 254 U. S. 122 (although the jurisdictional question is not discussed in the brief).

The case, therefore, is clearly one embraced within Section 237 (a) of the Judicial Code and this court has jurisdiction.

The judgment or decree to be reviewed is dated December 15th, 1927 (R. 40), and was filed December 16th, 1927 (R. 41). The writ of error was allowed by Chief Judge Cardozo of the New York Court of Appeals on February 7th, 1928 (R. 48), and filed on February 9th, 1928 (R. 47).

Statement of Facts.

Albert Simonson died on December 29th, 1925, a resident of the County and State of New York (R. 10). By paragraph Fifth of his will, the residue of his estate was left in trust, the income to be paid to his two daughters and their survivor until the death of the surviving daughter. At that time, the principal is to be paid to the grandchildren per stirpes, except that if the testator's son Felix shall not then have issue living but shall himself be alive, he is to take the share his issue would have taken had there been any (R. 27).

The executors filed a petition for the fixing of the transfer tax on their testator's estate (R. 10). The matter was referred to an appraiser (R. 9), with whom schedules of the decedent's property were filed (R. 12). The appraiser made his report (R. 6) and upon this the taxing order involved was entered (R. 5).

Statutes and Procedure Involved.

The relevant portions of Section 230 of the Tax Law, as amended by Chapter 144 of the Laws of 1925, effective March 16th, 1925, read as follows:

> "When property is transferred in trust or otherwise, and the rights, interest or estate of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, *which tax shall be computed on the full, undiminished value of such property at the time of the transfer without deduction for or on account of any intervening estate or interest*, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of

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said tax in accordance with this provision; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, *computed upon the full, undiminished value of the property as aforesaid.*" (Matter in italics added by amendment.)

Similarly, Section 241 as amended reads in part as follows:

"Whenever the tax on a contingent remainder has been determined at the highest rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the *tax commission* [state comptroller] in the counties wherein this tax is payable direct to it [him], and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate [so much of] the tax assessed upon such contingent remainders [as represents the difference between the tax at the highest rate and the tax upon such remainders which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate], and the *tax commission* [state comptroller] or the county treasurer shall deposit the amount of tax so retained in some solvent trust company or trust companies or savings banks in this state *designated by the state* comptroller, to the credit of the *state comptroller on account of* such estate, paying the interest thereon when collected by him to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will. Upon the happening of the contingencies or conditions whereby the remainder ultimately vests in possession, if the remainder then passes to persons taxable at the highest rate, the state comptroller on

> *the certificate of the tax commission* [or the county treasurer] shall turn over the amount so retained [by him] to the state treasurer as provided herein and by section two hundred and forty of this *chapter* [article], or if the remainder ultimately vests in persons taxable at a lower rate or a person or corporation exempt from taxation by the provisions of this article, the state comptroller [or the county treasurer] *on the certificate of the tax commission* shall refund any excess of tax so held [by him] to the executor or trustee of the estate, to be disposed of by said executor or trustee as provided by the decedent's will." (Matter in italics added by amendment; matter in brackets eliminated by amendment.)

The procedure under the amended statute and under which the tax in the present case was assessed is as follows:

Vested remainders are valued by deducting from the corpus of the trust estate the value of the precedent estates. *Contingent remainders, however, are valued at the full value of the corpus of the trust estate.* The tax is assessed at the highest rate upon which it might be assessed under any of the contingencies mentioned in the will, the differentiation in rates being based on the relationship of the beneficiary to the testator. Tax Law, Section 221 (a). The entire tax on the contingent remainder is retained by the state until the termination of the precedent estates, at which time an adjustment as to rate of tax is made, dependent on the relationship of the person who ultimately receives the remainder to the testator. Interest on the tax during this period is paid to the estate (see R. 37; also see *Estate of Kimball*, New York Law Journal, May 9th, 1927).

Prior to the amendment of Chapter 144 of the Laws of 1925, remainders, whether vested or contingent, were taxable at the death of the testator, the remainders being valued by deducting from the corpus of the estate the

value of the precedent estates, as is now done in the case of vested remainders only.

Matter of Zborowski, 213 N. Y. 109, at p. 113.

The tax on contingent remainders was fixed at the highest rate possible by any of the contingencies. The state held so much of the tax assessed upon a contingent remainder as represented the difference between the tax at the highest rate and the lowest possible rate, interest on this difference being paid to the estate during the running of the life estates. At the termination of the life estates, if the remainder vested in a person in some class other than the highest, a refund was made of the excess tax collected over that actually due (see R. 36, 37).

Assignments of Error.

All errors assigned are intended to be urged. All are based on the contention that the present system of transfer taxation in New York, whereby contingent remainders are valued for taxation at the full value of the corpus of the trust estate undiminished by the value of any precedent estates, is unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States in that thereby property is taken without due process of law and the constitutional guaranty of equal protection of the laws is denied.

POINT I.

The taxation of the remainder at a valuation equal to the corpus of the trust fund on which it depends, undiminished by the value of the precedent estates, is unconstitutional, being in violation of the due process of law clause of the Fourteenth Amendment.

(a) THE NEW YORK TRANSFER TAX IS ON THE TRANSFER BY THE DECEDENT AND NOT ON THE RECEIPT BY THE BENEFICIARY.

This is established beyond question by the decisions of the New York courts.

Matter of Home Trust Co. v. Law (Carnegie Estate), 204 App. Div. 590, at p. 594; aff'd without opinion, 236 N. Y. 607.
Matter of Westurn, 152 N. Y. 93, at p. 102.
Matter of Meriam, 141 N. Y. 479.

It is confirmed by a recent decision of this court.

Keith v. Johnson, 271 U. S. 1, at pp. 5, 9.

(b) BEING ON THE TRANSFER, THE TAX MUST BE MEASURED BY WHAT THE TESTATOR TRANSFERRED. THE STATE CANNOT CONSTITUTIONALLY TAX MORE.

The jurisdiction which a state must have for the purpose of validly levying a transfer tax must be based upon jurisdiction of the property transferred. This is a *sine qua non* of its existence.

Frick v. Pennsylvania, 268 U. S. 473.

See also

Buck v. Beach, 206 U. S. 392, at p. 400.
Matter of Estate of Swift, 137 N. Y. 77, at p. 86.

In other words, a state may tax the transfer of property which the decedent owned within the state's jurisdiction but may not tax the transfer of any other property.

The appraiser found that "the total of all property passing upon the death of the decedent" was $352,718.05 (R. 8). That finding has not been disputed by any party. *Yet the total taxed and stated to be distributed is $573,025.37* (R. 9, total of first column). This amount is arrived at as follows:

Cash and specific legacies	$ 12,140.00
Joint and surviving life estate of Ettie B. Simonson in residuary trust of $320,083.37, less commissions	120,401.00
Joint and surviving life estate of Nettie I. Simonson in residuary trust of $320,083.37, less commissions	120,401.00
Remainder of trust (without deducting value of foregoing life estates)	320,083.37
Total	$573,025.37

The excess of $220,307.32, owing its existence solely to a computation of the appraiser, has no basis in fact. It is non-existent property not owned by the decedent, and hence not transferred by him. The paintings in the *Frick* case had an actual existence, but one outside of the state's dominion. *A fortiori* property having *no existence whatsoever* is not within the state's jurisdiction and an attempt to tax the "transfer" of it transcends the state's powers, limited as they are by constitutional safeguards.

As the New York Court of Appeals said in *Matter of Terry*, 218 N. Y. 218, at page 223:

> "In all cases we must carve out of one total—the value of the property transferred as of the death of the decedent—the value of the present and the future interests, and the parts can never be greater than the whole."

(c) THE TAX CANNOT BE JUSTIFIED BY ATTRIBUTING TO THE REMAINDER A FICTITIOUS VALUE IN EXCESS OF ITS REAL VALUE. THE LEGISLATURE IS CONSTITUTIONALLY PROHIBITED FROM TAXING A FICTION.

To meet the argument that the state may not tax more than is transferred, it is claimed that a life estate and a remainder were transferred and that nothing more is being taxed and that the pronouncement of the legislature that the remainder has a value equal to the corpus of the trust estate precludes any further inquiry into the question of such value. The conclusion does not follow from the premise. No court will accept as binding a legislative fiat which is absolutely opposed to fact.

This prohibition against the taxing of a fiction—the taxing of the transfer of property conjured up out of thin air by legislative waving of a wand—is strikingly illustrated by the decision of this court in *Schlesinger v. Wisconsin*, 270 U. S. 230. The section of the State Transfer Act establishing an absolute presumption that gifts made within six years of death were made in contemplation of death was held unconstitutional. The presumption established a *fiction* opposed to the *fact* that many gifts made within six years of death were not made in contemplation thereof. The state was forbidden from creating by its legislative fiat transfers of property subject to a death tax when the fact might be that no such property existed.

The present case is even stronger. Undoubtedly, some gifts made within six years of death *are* made in contemplation thereof. In the case at bar, property of the value of $352,718.05 only existed, was transferred and is subject to the tax. Not one cent more of property either existed anywhere or was transferred, and fictional property worth $220,307.32 cannot be created by the legislature and, having thus been created by the legerdemain of a statute, be validly subjected to a transfer tax.

The courts below have found, as the statute required them to do, that this fictitious property does exist for tax

purposes. Such a declaration, however, whether made by court or legislation, is absolutely opposed to fact, as we have shown, and will not be allowed to stand merely because made. As was said in *Matter of Barbour*, 185 App. Div. 445, at p. 457, affirmed 226 N. Y. 639:

> "With reference to the power of the Legislature to enact a statute of the force which a Comptroller seeks to give to the amendment of 1916 to the Transfer Tax Law, while it is not open to serious dispute that it has power to enact that one fact shall be evidence of another, it is a self-evident proposition that the Legislature cannot make so that which is not so."

See also

> *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, at p. 547.
>
> *People* v. *Weller*, 237 N. Y. 316, at p. 324.
>
> *Peralta* v. *Atlantic Coast Line Co.*, 211 U. S. 210, at pp. 226-227.

That the value of the remainder is not that of the corpus of the trust estate is, of course, obvious. This court will take judicial notice of the fact that the probable—or even the certain—receipt of $1,000 ten years from now is not worth $1,000 at the present time. It is worth, of course, the present value of the corpus less that of the intervening life estates as determined by mortality tables.

Matter of Zborowski, 213 N. Y. 109, at p. 113.

This is not mere mathematical juggling of the kind resorted to by the appraiser to make two dollars' worth of property appear where only one dollar's worth existed the moment before; it is a mathematical interpretation of the actual facts. We respectfully submit that it is on mathematics having only such a factual basis that a constitutional transfer tax may be based.

(d) SECTION 230 IS NOT RENDERED CONSTITUTIONAL BY THE "SECURITY" PROVISIONS OF SECTION 241.

It was insisted by the learned justice who wrote the opinion of the Appellate Division (R. 38) that the tax although presently assessable is not payable until the remainder vests in possession, and that a tax on a contingent remainder on the assessment of its present worth payable presently and one on its face value payable at the date of vesting are "exact arithmetical equivalent(s)." Interest on the tax, paid to the life beneficiary during the course of the life estate, is said to equalize the tax on a remainder at its diminished value payable at death and one on the undiminished value payable at the time of vesting.

This equivalence does not exist for several reasons. In the first place, the assumed equivalence does not exist because the New York tax is a *graduated* one, and in nine cases out of ten and certainly in the present estate the tax on the remainder at its undiminished value will be at a different rate from the tax on the diminished value. The increase in the amount taxed increases the rate of tax. Assuming that the beneficiaries are all lineal descendants and are therefore of the so-called "one per cent. class," the tax would be one per cent. on any amount up to and including $25,000, two per cent. on the next $75,000, three per cent. on the next $100,000, and four per cent. on the balance. Similar gradations of rate are found in the two per cent. and five per cent. classes (New York Tax Law, Section 221-A).

Again, the alleged equivalence cannot exist because life tenants do not die at the precise termination of their life expectancies. Therefore, unless the exceptional does happen and the life tenant does die at the exact moment at which the mortality table predicts that he will, interest will be paid for a greater or less period than that assumed for the purposes of this "mathematical" argument. In addition, mortality and valuation tables are based on a five per cent. return. If cash is paid, the bank interest

received pursuant to Section 241 of the Tax Law will certainly not be at the same rate; if securities are deposited, it probably will not.

Finally, even if the two taxes were the same in amount, it would be no reason for sustaining the statute levying the present one. In *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, this court has said (at p. 683):

> "The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration."

POINT II.

The amendment to Section 230 of the Tax Law is unconstitutional because it sets up arbitrary and unreasonable classifications.

No attempt is made to argue that reasonable classification is not permitted for taxation purposes. It is well settled, however, that such classifications must be based upon some real and substantial distinction bearing a real and just relation to the purpose for which the classification is made.

Southern Railway Co. v. *Greene*, 216 U. S. 400, at p. 417.

Royster Guano Co. v. *Virginia*, 253 U. S. 412, at p. 415.

Air-way Corp. v. *Day*, 266 U. S. 71, at p. 85.

Under the taxing system set up by the 1925 amendment to Section 230 of the Tax Law, this well established principle is violated in two ways:

(a) By providing different methods for evaluating vested and contingent remainders; and

(b) By discriminating between vested and contingent remaindermen.

A. VESTED AND CONTINGENT REMAINDERS MUST BE VALUED BY THE SAME METHODS.

By the amendment to Section 230 of the Tax Law, contingent remainders are given for taxation purposes the full value of the corpus of the trust estate, while vested remainders are valued by deducting from the value of the corpus the value of the precedent estates (see *supra*, p. 7). Such a distinction is so arbitrary that it cannot be supported. Both contingent and vested remainders constitute property. Either may be alienated or devised. A contingent remainder is no larger or more valuable than a vested remainder in the same amount. Both are capable of valuation by exactly the same method.

Take, for example, the case of a life estate in $1,000 for the life of Jones, with a vested remainder to Smith. Suppose another life estate in $1,000 measured by the life of the same Jones with a remainder to Brown, or, if he be dead, to Green—a contingent remainder. On Jones' death Smith will take the remainder in the first case, and either Brown or Green in the second. Yet, no matter whether Brown or Green takes, *the amount* which he receives will be exactly the same as that which goes to Smith. In other words, the value of the remainder at the time of the inception of the life estate is precisely the same in either case. No matter who takes, the value of the interest transferred is constant. This being patently so, we submit that to value the two future interests by different methods so that one is given a value greatly in excess of the other, is so arbitrary that this court will not permit it to stand.

Any statutory mandate or even course of practice whereby similar property is differently valued for tax purposes is in violation of the 14th amendment to the United States Constitution.

Sioux City Bridge v. *Dakota County*, 260 U. S. 441, at pp. 446-447.

Sunday Lake Iron Co. v. *Wakefield*, 247 U. S. 350, at pp. 352-353.

Central R. Co. of New Jersey v. *Jersey City*, 199 Fed. 237, at p. 242; aff'd 212 Fed. 76.

B. The discrimination between remaindermen is so arbitrary as to render the amendment unconstitutional.

As shown above, whether the remainderman be contingent or vested, the actual value of that which he receives is the same. Yet under New York's present taxation system, the contingent remainderman receives the corpus of the trust estate less the tax on the precedent estates and the tax on the entire corpus, while the vested remainderman receives the corpus less only the tax on the life estate and the tax on the corpus diminished in value by the value of the precedent estates.

Suppose a man leaves $10,000 in trust for the life of his wife, the remainder to his son, John—a vested remainder. Another $10,000 is left in trust for the life of his wife, the remainder to his son, Henry, if Henry be living, and if not, then to another son, James—a contingent remainder. All beneficiaries are of the 1 per cent. class so no question of a refund on the termination of the life estate arises.

Both John and either Henry or James will receive their respective shares on the same date, to wit, the death of the mother. Certainly the testator expected, as would anyone else, that when his sons receive their money each would receive the same amount, but this will not be the case if Section 230 as it now reads is upheld. Henry or James will receive a sum less than John by the amount by which the tax on the undiminished value of the corpus of his trust fund exceeds the tax on the diminished value. It is not conceivable that any legislative body has power thus to discriminate between two sons who are in the same class. One receives no more or less than the other nor is more or less property transferred by the decedent in either case.

It is no answer to state that the tax being on the transfer of property and not on its receipt, it makes no difference if contingent and vested remaindermen in the same amount receive different sums. The discrimination com-

plained of is between two classes of *property*—vested and contingent remainders—both capable of the same valuation and of being taxed in the same manner and at the same time, but which are not under the present system. In addition, however, the fact cannot be ignored that although the tax is paid by the estate and not by the beneficiary, as a matter of practical working out, the contingent remainderman is made to suffer unreasonably while the vested remainderman is favored over him.

CONCLUSION.

The judgment of the Surrogates' Court entered on the remittitur of the Court of Appeals should be reversed.

Dated, New York City, October, 1928.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 79.

LEO SALOMON, JACQUES H. HECHT, ISIDORE M. KASTNER, *et al., etc.*,
Plaintiffs-in-Error,

versus

STATE TAX COMMISSION OF NEW YORK,
Defendants-in-Error.

BRIEF FOR DEFENDANTS-IN-ERROR.

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BRIEF FOR DEFENDANTS IN-ERROR.

Statement of the Case.

The opinions below are reported as follows: Surrogates' Court, 127 Misc. 211; Appellate Division, First Department, 219 App. Div. 656; Court of Appeals, no opinion, 246 N. Y. 602.

The sole question presented for the determination of this court in this case is whether the transfer tax law of the state of New York is in violation of the provisions of the fourteenth amendment to the constitution of the

United States as denying "due process of law" and or "equal protection of the laws" to plaintiffs in error because of the provisions made a part thereof by chapter 144 of the laws of New York of 1925*, which require that where property is transferred subject to contingencies the tax shall be imposed upon the basis of the full, undiminished value thereof at the time of the transfer, without deduction for or on account of any intervening estate or interest, the effect of such statute in case of a transfer by will being to impose the tax at the time the transferee comes into actual possession and enjoyment of the property, instead of at the time of death, which latter is the time of the imposition of the tax on transfers which are not contingent.

The most common form of contingent transfer is a remainder created by will where the absolute vesting is dependent upon future events. The term "contingent remainder" is frequently, but inaccurately, employed to designate the contingent transfers to which the statute applies.

In order that the question at issue may receive proper consideration, it is of importance that there be presented a review showing the development of

THE POLICY OF THE STATE OF NEW YORK IN RESPECT TO THE TAXATION OF CONTINGENT TRANSFERS

The first transfer or inheritance tax law of the state of New York was enacted in 1885 (New York laws of 1885, ch. 483). Under that statute it was held that contingent

* For convenience this chapter is reproduced as Appendix A to this brief, in such form as to show the changes in the law effected by it.

transfers, not being subject to appraisal as of the date of a decedent's death, were not taxable as of that time (*Matter of Cager*, 111 N. Y. 343), but such transfers were held to be taxable when they vested in possession and enjoyment, at which time it was possible to ascertain who the beneficiaries would be and the amounts they would take. (*Matter of Stewart*, 131 N. Y. 274.) When the transfers vested, the tax was computed upon the value of the property transferred determined as of the date of the death of the transferor, but the value of any intervening life or other temporary estate was deducted. (*Matter of Sloane*, 154 N. Y. 109.) Under this procedure the state was deprived of the use of the tax on a contingent transfer during the period from the date of the transferor's death until the termination of the intervening temporary estate merely because of the fact that the transfer of the remainder was subject to contingencies. In the case of a vested transfer the state received the tax, computed in exactly the same manner and on the same valuation, at the time of the transferor's death. To illustrate: Assume that the life use of a fund of $100,000 was given to A, and upon his death the *corpus* to go to B, if living, or, if B should die before A, to C. Assume that the value of A's life estate was $25,000. If B survived A a tax would have been payable upon a valuation of $75,000, but payment would not have been required until A's death. If the same fund had been left to A for life, with remainder absolutely vested in B, B would have been taxable on $75,000, but the tax would have been payable at the time of the transferor's death. This discrimination between contingent and vested transfers was entirely indefensible.

To wipe out this discrimination the New York legislature in 1897 enacted the first provision for the taxation

of contingent transfers "at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited." (New York laws of 1897, ch. 284.) The language quoted is substantially the same as was used by the New York legislature when it enacted the provisions here under review.

The 1897 provision for taxation of contingent transfers on the basis of the full, undiminished value of the property transferred was omitted from the transfer tax law by New York laws of 1899, ch. 76, but was restored by New York laws of 1901, ch. 173, and had ever since remained in the law. It is now found in section 230 of the tax law.

The validity of imposing the tax on the basis of the full, undiminished value of the property as above set forth was passed upon and sustained by the court of appeals of New York on December 28, 1916, in *Matter of Seligmann*, 219 N.Y. 656, which affirmed 170 App. Div. 837. The provision was also before the court of appeals and was construed by it on October 22, 1907, in *Matter of Naylor*, 189 N. Y. 536, which affirmed 120 App. Div. 738, the case at appellate division appearing *sub nom. Matter of Mason*.

Under the procedure whereby the taxation of contingent transfers was suspended until the happening of the contingencies and the falling in of the estates in remainder, it became apparent that the state was suffering loss of its revenues because of the impossibility of keeping track of such transfers and of ascertaining when the

contingencies happened. The procedure also resulted in much confusion. To remedy these conditions the New York legislature in 1899 enacted a provision for the taxation of contingent transfers at the time of the transfer at the highest possible rate, the tax being made payable "out of the property transferred," but being subject to adjustment when the contingencies happened. (New York laws of 1899, ch. 76.) The constitutionality of this act was questioned but was upheld by the court of appeals in *Matter of Vanderbilt*, 172 N. Y. 69, and *Matter of Brez*, 172 N. Y. 609. In the *Brez* case it was pointed out that the change in the statute worked an injustice on the life tenant in that he was deprived of the income of that portion of the *corpus* which was applied to the payment of the tax and that the provision for refund, with interest, in cases where the remainder eventually became taxable at less than the highest rate, did not right the wrong, inasmuch as the life tenant at the time the refund became payable would be dead and could not receive the benefit thereof.

The act of 1899 provided that where the tax was paid at the highest possible rate out of the property transferred and it eventually appeared that an excess amount had been collected, such excess should be refunded with legal interest from the time it was paid. Later by New York laws of 1902, ch. 496, the rate of interest was reduced to three per cent per annum, and still later when New York laws of 1911, ch. 880, was enacted no provision whatsoever was made for interest on the amount of the refund.

To meet the objection pointed out in the *Brez* case and grant a measure of relief to the life tenant, it was provided in the act of 1911, by amendment to section 230 of the New York tax law, that a temporary order taxing a contingent

transfer might be entered, which would fix the tax at the highest possible rate and also, by amendment to section 241 of said tax law, that the state comptroller or county treasurer to whom the tax was payable should retain and hold to the credit of the estate so much of the tax so assessed as represented the difference between the tax at the highest possible rate and the tax which would be due if the contingencies or conditions had happened at the date of the appraisal of the estate, the latter amount (hereinafter referred to as the "low rate") being paid into the state treasury in the usual manner. The amount retained was required to be deposited in a trust company or savings bank to the credit of the estate and the interest earned thereon was payable to the executor or trustee of the estate to be applied as provided by the will. Upon the happening of the contingencies or conditions which determined the final disposition of the property, an adjustment of the tax was required to be made and if it then appeared that an excess amount had been collected and deposited the amount of such excess was required to be refunded, of course, without interest. Provision was also made that in lieu of paying the difference between the tax at the highest possible and low rates in cash, the executor or trustee might elect to deposit with the state comptroller (now state tax commission) or county treasurer bonds or other securities for the purpose of securing the payment of such difference, which bonds or other securities were required to be held until the happening of the contingencies or conditions and the falling in of the remainders. During the period that the bonds or other securities were so held the income therefrom was payable to the executor or trustee. This was the status of the law immediately prior to the enactment of chapter 144 of the laws of 1925.

There were two objections to the method of taxation of contingent transfers established by the act of 1911, the first being that the life tenant was still deprived of the income on the amount which was taken out of the property transferred and used to pay the tax at the low rate and to that extent at least injustice to the life tenant as pointed out in the *Brez* case was continued. The second was the same objection that was made to the law which suspended contingent transfers from taxation and did not provide for the computation of the tax on the basis of the full, undiminished value of the property when the transfers vested. That is, the value of the remainder being determined as of the date of the transferor's death by deducting from the value of the property the value of the intervening temporary estate, and only such diminished value being subjected to tax, resulted in the loss to the state of the use of so much of the tax as represented the difference between the highest and low rates from the time of the transferor's death until the contingencies or conditions happened, the income on such amount during said period being payable to the executor or trustee. In other words, if the remainders vested at the highest rate the state lost the interest on the amount which represented the difference between the highest and low rates of tax during the entire period that elapsed from the time of the transferor's death until the remainders vested, and this despite the fact that under the acts of 1897 and 1901, and ever since, when the taxation of contingent transfers is suspended the state, when the remainders fall in, receives a tax computed on the full, undiminished value of the property transferred as of the date of the transferor's death, which is substantially the equivalent of a tax on the diminished value of the property at the time of the transferor's death plus the use of the money from that time until the vesting.

The act of 1925 was designed to correct both of the aforementioned defects in the law. It gives to the life tenant the income from the entire *corpus* and it taxes the remainder on the basis of the full, undiminished value of the property transferred as of the date of the transferor's death without deduction of the value of the intervening temporary estate. The use and benefit of this tax, however, does not vest in the state until the remainder falls in and it is, therefore, substantially the equivalent of a tax payable at the time of the transferor's death, based upon the value of the *corpus*, less the value of the intervening temporary estate. The discrimination between vested and contingent transfers is removed. Adjustment of the tax is made when the remainder falls in, if it then vests in a person taxable at less than the highest rate. The provision for taxation at the full, undiminished value at the time of vesting in possession and enjoyment as applied to contingent transfers the taxation of which was suspended under the law prior to 1892, has been made applicable where the tax is immediately payable out of the property transferred. Instead of waiting for the contingencies or conditions to happen and then exacting the tax computed on the full, undiminished value, and running the risk of being then unable to collect, or perhaps of never obtaining knowledge on which to base a demand for the tax, it is required that the tax so computed shall be deposited or security given for its payment at the time of the transfer. The tax on the remainder is exactly the same as it was under the former law when taxation was suspended. Then it was computed on the full, undiminished value of the property transferred and now it is computed in identically the same way. The life tenant is treated the same as he was under the law which provided for the suspension of taxation and is better off than he was under the act of 1911 for under

that act he lost the income from a portion of the *corpus*. Under the present act he loses only that part of the income which might have been derived from the portion of the property which is used to pay the tax upon the life estate. The entire tax upon the remainder is held until it falls in and the income therefrom goes to the life tenant, or if bonds or other securities are deposited the income is paid to the life tenant, and the state receives the beneficial use of no portion of the tax until the contingencies or conditions happen. Any possible hardship which might result from the requirement that security be given for the payment of the tax when the remainder falls in is removed by the provision of the act of 1925 that where the personal property included in the transfer is less than the amount of the tax, the executors or trustees, in lieu of paying the tax or depositing bonds or other securities, may elect to file in the office of the tax commission a bond to the people of the state for the purpose of securing the payment thereof.

The intent of the legislature of New York in providing for the taxation of contingent transfers prior to the enactment of the act of 1925 was concisely stated by Judge Cardozo in *Matter of Parker*, 226 N. Y. 260, 264, when he said:

> "Everywhere the scheme disclosed is absolute safety for the state with a minimum of hardship for the life tenant."

The act of 1925 was intended to make this policy more effective. It introduced no new principle into the law of New York but was merely a somewhat different application of principles of long standing.

The act of 1925 provides:

(a) For the taxation of contingent transfers at the highest possible rate which on the happening of any contingency or condition would be possible. This principle was first enacted by the act of 1899.

(b) For the computation of the tax on the basis of the full, undiminished value of the property at the time of the transfer, without deduction for or on account of any intervening estate or interest. This principle was introduced into the law of New York by the act of 1897.

(c) For the security of the state against ultimate payment of the tax found to be due by the requirement of a deposit or the giving of security. This principle was first invoked by the act of 1911, although the act of 1899 was even more severe in that it required payment of the highest possible tax at the time of the transfer.

Thus has been developed the policy of the state of New York in respect to the taxation of contingent transfers. In each successive enactment the legislature has endeavored to procure a greater degree of equity in the imposition of the tax while at the same time protecting the revenues of the state.

At the time the bill which became chapter 144 of the laws of 1925 was pending, the same having been prepared by the state tax commission and introduced on its recommendation, a written memorandum was filed by it with the majority and minority leaders of both houses of the legislature, the speaker of the assembly, the chairmen of the committees on taxation and retrenchment of both houses and the governor, setting forth the reasons for the bill. A copy of this statement is made Appendix B to this brief.

POINT I.

There can be no question as to the power of the state of New York to classify contingent transfers and tax them in the manner provided by laws of 1925, ch. 144.

The rule is well established that this court will adopt the construction of the act of 1925 made by the court of appeals of New York. A recent case so holding is *Saltonstall v. Saltonstall*, 276 U. S. 260.

See also:

Keith v. Johnson, 274 U. S. 1;
Green v. Lessee of Neal, 6 Pet. 291;
Fairfield v. County of Gallatin, 100 U. S. 47;
Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458.

It is not understood that plaintiffs in error challenge this rule, but we wish to point out that the court of appeals decided this case without opinion. Hence, we are without information as to the reasons which influenced that court in arriving at its conclusion. All we know is that the court of appeals examined the statute and found that it in no way conflicted with either the constitution of the state of New York or the constitution of the United States. Plaintiffs in error are therefore in error when they state, at page 13 and elsewhere in their brief, that the courts below based their decision upon the mathematical formula that there is no difference between taxing a contingent remainder on the assessment of its present worth, with a tax payable presently, and taxing it, with a tax payable at the date of vesting, on its face value rather than its

present worth, as one is the exact arithmetical equivalent of the other. This was stated by the appellate division, first department, as one of the reasons for sustaining the statute, but it does not follow that the court of appeals adopted the precise reasoning of the appellate division. We believe Mr. Justice Proskauer, who wrote the opinion at appellate division, did not intend to choose the precise language which he used. It has never been argued by defendants-in-error that there is no difference between the two methods of taxation, although it has been argued that there is no very great difference. We think Mr. Justice Proskauer was merely expressing his acquiescence in the argument of defendants-in-error which was and is that the method of taxing contingent transfers is "substantially the equivalent" of the method of taxing vested transfers. Anyway, the question of constitutionality does not turn on this point. This reference to it is merely for the purpose of keeping the record straight as to what the courts below did.

To take up the question of classification, we find it to be settled that a state may adopt any method of classification which rests upon a substantial difference and has a substantial relation to the object of the legislation. It is true that a classification which is wholly arbitrary or capricious will not be upheld, but it has been held that it is sufficient if a classification be reasonably founded in the purposes and policy of taxation.

Watson v. State Comptroller, 254 U. S. 122, where it was said (pp. 124-5):

> "Any classification is permissible which has a reasonable relation to some permitted end of governmental action. * * * It is enough, for instance, if the

classification is reasonably founded in 'the purposes and policy of taxation.'"

And in *Keeney v. New York*, 222 U. S. 525, 536, it was said:

"There can be no arbitrary and unreasonable discrimination. But when there is a difference it need not be great or conspicuous in order to warrant classification."

See also:

Beers v. Glynn, 211 U. S. 477;
Matter of Keeney, 194 N. Y. 281;
People ex rel. Farrington v. Mensching, 187 N. Y. 8;
Board of Education v. Illinois, 203 U. S. 553.

It should not require profound argument to establish that there is a very real difference between transfers which are vested and transfers which are contingent, between vested remainders and contingent remainders. In the case of the vested remainder, the person who ultimately and in all events will take it is definitely established by the will and conditions which exist at the time of the testator's death. Where the remainder is contingent it is impossible at the time of the testator's death to determine who will take it, such determination being dependent upon future events. In taxing the vested remainder the assessor may definitely point to the person against whom the tax is to be levied and, where rate depends upon relationship, the tax may be fixed with precision. Where the remainder is contingent and may pass to any one of several persons, the assessor cannot determine against whom the tax should be assessed, or the rate of taxation, if the possible re

cipients bear different relationships to the testator or the amount of tax which may be imposed varies for other reasons. The vested remainder is simple and certain; the contingent remainder is technical, complicated and uncertain. The vested transfer adapts itself readily to a system of inheritance taxation. The contingent transfer is awkward and difficult to accommodate.

That there is a clear distinction between vested and contingent remainders is brought out in *Keeney v. New York*, 222 U. S. 525, *supra*, at p. 535, where it was said:

> "It is true that in New York it is as lawful to create an estate for life, with remainder after the death of grantor, as it is to convey in fee, or with remainder after the death of a third person, or on the happening of a particular event. But there is a difference in law as well as in practical effect between these various estates. Every encouragement is given to making conveyances in fee. But, from an early date, public policy has been opposed to the private interest which impelled men to withdraw property from the channels of trade and tie it up with limitations intended, among other things, to secure to the beneficiary the use of the property, while at the same time removing it, to some extent, from liability for his debts. The favored transfers in fee need not be taxed with the latter, even though the law permits their creation. These latter estates *also differ among themselves*." (Italics ours.)

In the same case it was said (p. 535):

> "The Fourteenth Amendment does not diminish the taxing power of the State, but only requires that in its exercise the citizen must be afforded an opportunity to be heard on all questions of liability and

value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection. It does not deprive the State of the power to select the subjects of taxation. But it does not follow that because it can tax any transfer (*Hatch v. Reardon*, 204 U. S. 152, 159), that it must tax all transfers, *or that all must be treated alike.*" (Italics ours.)

To show the wide range of classifications permitted under inheritance tax laws brief reference will be made to some of the methods employed. Classification is valid if made

(a) By domicile.
Board of Education v. Illinois, 203 U. S. 553, *supra.*

(b) By relationship.
Estate of Campbell, 143 Cal. 623.

(c) By amount of property transferred.
Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283.
Knoulton v. Moore, 178 U. S. 41.

(d) By the kind of property transferred.
Beers v. Glynn, 211 U. S. 477, *supra*, aff'g *Matter of Lord*, 186 N. Y. 549.
Matter of Watson, 226 N. Y. 584, aff'd *sub nom. Watson v. State Comptroller*, 254 U. S. 122, *supra.*

(e) By the kind of transfer.
Matter of Keeney, 194 N. Y. 281, aff'd *sub nom. Keeney v. New York*, 222 U. S. 525, *supra.*

On the question of classification see also:
People ex rel. Eisman v. Ronner, 185 N. Y. 285;

People ex rel. Hatch v. Reardon, 184 N. Y. 431, aff'd *sub nom. Hatch v. Reardon*, 204 U. S. 152;

Matter of McPherson, 104 N. Y. 306;

People ex rel. Farrington v. Mensching, 187 N. Y. 8, *supra*.

Contingent transfers have always been classified separately and differently from vested transfers under the various transfer tax acts of New York state. At all time vested transfers have been taxable at the time of the decedent's death, and the tax has been immediately paid into the state treasury. Under the early laws imposing the transfer tax the tax on contingent transfers was suspended. When these transfers vested, at times the diminished value at the time of the decedent's death was taxed and at other times the full undiminished value at the time of the decedent's death was taxed. From 1899 to 1911 contingent transfers were taxed at the highest possible rate and the tax was immediately paid into the state treasury, subject to a refund if it ultimately developed that the tax paid was excessive. This refund from 1899 to 1902 carried interest at six per cent, from 1902 to 1911 at three per cent and thereafter no interest was provided for. From 1911 to 1925 the tax on such contingent transfers might be fixed at both the highest possible rate and at the rate which would be due if the contingency had happened at the date of the appraisal, in which event the tax at the low rate was immediately payable into the state treasury and the difference between the highest and low rates was deposited to the credit of the estate or secured by the deposit of securities, the income from such deposits being payable to the estate until the happening of the contingency.

The act of 1925 makes a distinction in the method of taxation between contingent transfers and vested trans-

fers. Although there is no great difference in the amounts of tax imposed by the act on vested and contingent transfers, respectively, there is a considerable difference in the method of the imposition of the tax and the manner of its payment, born of the necessity which exists for treating these two classes of transfers differently.

The difference in classification being well founded in reason and the policy of the state, the test of constitutionality is the treatment accorded to the class. Does the law in its application to contingent transfers operate alike on all persons and property within the class? The answer is that there is no discrimination whatsoever, as all contingent transfers are treated exactly alike and all persons or classes of persons who take contingent transfers are treated exactly alike.

> "It may also be said that a legislature is not bound to impose the same rate of tax upon one class of property that it does upon another. As it may exempt all of one class so it may impose a different rate of taxation. It is sufficient if all of the same class are subjected to the same rate and the tax is administered impartially upon them."
>
> *Michigan Central Railroad v. Powers*, 201 U. S. 245, 302.

In *Billings v. Illinois*, 188 U. S. 97, the inheritance tax law of Illinois imposed no tax upon life estates passing to a mother, father, husband, wife, brother and sister, the widow of a son or a lineal descendant of the decedent, provided the remainder after the life estate was transferred to collateral heirs, strangers in the blood or bodies politic or corporate, but did impose a tax upon such life estates when the remainder passed to lineal heirs. It was held

that the Illinois act did not violate the fourteenth amendment to the constitution of the United States for the reason that the legislature of Illinois had the right to classify the transfers and treat the classes differently in imposing its taxes. Surely, if a classification scheme is valid which puts in one class life estates where the remainder passes to collateral heirs, etc., and in another class, life estates where the remainder passes to direct heirs, there would seem to be no doubt but that the New York legislature may put vested remainders in one class and contingent remainders in another and tax them differently, particularly when there is not only a very marked difference in the nature of the remainders but a very good reason for separate classification for the purpose of carrying into effect the taxing policy and system of the state.

In the *Billings* case, in discussing classification, it was said (pp. 101-3):

> "We said it was established by cases that classification must be based on some reasonable ground. It could not be a 'mere arbitrary selection.' But what is the test of an arbitrary selection? It is difficult to exhibit it precisely in a general rule. 'Classification is essentially the same in law as it is in other departments of knowledge or practice. It is the grouping of things in speculation or practice, because they 'agree with one another in certain particulars and differ from other things in those same particulars.' Things may have very diverse qualities, and yet be united in a class. They may have very similar qualities, and yet be cast in different classes. Cattle and horses may be considered in a class for some purposes. Their differences are certainly pronounced. Salt and sugar may be associated in a grocer's stock for a

grocer's purposes. To confound them in use would be very disappointing. Human beings are essentially alike, yet some individuals may have attributes or relations not possessed by others, which may constitute them a class. But their classification—indeed, all classification—must primarily depend upon purpose—the problem presented. Science will have one purpose, business another and legislation still another. The latter, of course, on account of the restraints upon the legislature, may not be legal—may not be within the power of the legislature. To dispute that power, however, is not the same thing at to dispute a classification, and yet that there may be dependence—more freedom of classification in some instances—has been indicated by the cases. A state cannot regulate interstate commerce, however accurate its classification of objects may be. On the other hand, the taxing power of a state is one of its most extensive powers. It cannot be exercised upon persons grouped according to their complexions. It can be exercised if they are grouped according to their occupations. A state may regulate or suppress combinations to restrict the sale of products. The power cannot be exerted to forbid combinations among those who buy products and permit combinations among those who raise or grow products. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. And yet, exercising its taxing power, it has been decided, that a state may make that discrimination. *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89. Other illustrations may be taken from the cases which tend to the same end. If the purpose is within the legal powers of the legislature, and the classification made has relation to that purpose (excludes no persons or objects that are affected by the purpose, includes all

that are), logically speaking, it will be appropriate; legally speaking, a law based upon it will have equality of operation. And, excluding our right to consider policies or assume legislation, we have many times said that a state in its purposes and in the execution of them, must be allowed a wide range of discretion, and that this court will not make itself 'a harbor in which can be found a refuge from ill advised, unequal and oppressive legislation.' *Mobile Co. v. Kimball*, 102 U. S. 691."

At page 104, it was said:

"Undoubtedly, life tenants regarded simply as persons, may be in legal contemplation the same; estates for life regarded simply as estates with their attributes also in legal contemplation, may be said to be the same, but that is not all that is to be considered, nor is it determinative. We must regard the power of the State over testate and intestate dispositions of property, its power to create and limit estates, and, as resulting, its power to impose conditions upon their transfer or devolution. It is upon this power that inheritance tax laws are based, and we said, in the *Magoun* case, that the power could be exercised by distinguishing between the lineal and collateral relatives of a testator. There the amount of tax depended upon him who immediately received; here the existence of the tax depends upon him who ultimately receives. That can make no difference with the power of the State. No discrimination being exercised in the creation of the class, equality is observed. Crossing the lines of the classes created by the statute discriminations may be exhibited, but within the classes there is equality."

POINT II.

The method of measurement of the tax is reasonable and one which the state of New York may properly adopt as a regulation of the right of succession.

The tax upon contingent transfers under the act of 1925 is measured by the full, undiminished value of the property transferred as of the date of the transfer, although the effect of the law is to defer the payment until the contingencies happen and the remaindermen come into possession and enjoyment.

Is there anything inherently wrong with this method of measuring the tax which would constitute a violation of the fourteenth amendment of the constitution of the United States?

The New York transfer tax is a tax on the succession to property at the death of the owner and not upon the property itself. It is a regulation of the privilege of succession. Such privilege being a right created by the state.

Matter of Sherman, 153 N. Y. 1;
Matter of Penfold, 216 N. Y. 163;
Matter of Keeney, 194 N. Y. 281, aff'd *sub nom.* Keeney v. New York, 222 U. S. 525, *supra*;
Matter of Swift, 137 N. Y. 77;
Matter of White, 208 N. Y. 64.

In *Matter of Sherman* it was said, page 4:

"The tax imposed is not, in a proper sense, a tax upon the property passing by will, or under the Statutes of Descents or Distributions. It is a tax upon the right of transfer by will, or under the intestate law of the

state. Whether these laws are regarded as a limitation on the right of a testator to dispose of property by will or upon the right of devisees to take under a will, or the right of heirs or next of kin to succeed to the property of an estate, is not material. The so-called tax is an exaction made by the state in the regulation of the right of devolution of property of decedents, which is created by law, and which the law may restrain or regulate."

In *Matter of Penfold* it was said, pages 166-7:

"Neither the right to make a testamentary disposition or the right to inherit property is an inherent right. It is not guaranteed by the fundamental law. It depends entirely upon the consent of the legislature. It can withhold or grant the right, and if it grants it it may make its exercise and its extent subject to such burdens and requirements as it pleases."

The principle that the tax is on succession and not on property has been repeatedly recognized by this court.

In *Mager v. Grima*, 8 How. 490, 493-4, Mr. Chief Justice Taney said:

"* * * The law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. * * * And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

In *Knowlton v. Moore*, 178 U. S. 41, 57, *supra*, Mr. Justice White said:

> "Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."

In *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 288, *supra*, it was said:

> "They" (inheritance taxes) "are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."

In *United States v. Perkins*, 163 U. S. 625, which construed the New York transfer tax law, it was said, page 628:

> "Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee."

and, at page 629, it was also said:

> "That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held both in New York and in several other states, * * *."

In *Keeney v. New York*, 222 U. S. 525, page 534, *supra*, it was said:

"Wherever the amount of a tax is, as here, to be measured by the value of property, it has been earnestly argued that it was to tax the property itself, and that to ignore that feature is to put the name above the fact. But when the State decides to impose such a tax the amount must be determined by some standard. To require the same amount to be paid on all transfers is not so fair as to impose the burden in proportion to the value of the property. An excise on transfers therefore does not lose that character because the amount to be paid is determined by the values conveyed."

The power of a state to regulate the succession to property on the death of the owner gives it more extensive rights in the imposition of transfer taxes than it would have if it relied alone upon its taxing power.

This was brought out by Mr. Justice Stone, writing in *Stebbins v. Riley*, 268 U. S. 137, 140-1, where he said:

"• • • it has been repeatedly held by this Court that the power of testamentary disposition and the privilege of inheritance are subject to state taxation and state regulation and that regulatory taxing provisions, even though they produce inequalities in taxation, do not effect an unconstitutional taking of property, unless, as was said in *Dane v. Jackson*, 256 U. S. 589, 599, the taxing statute 'results in such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—"to spoliation under the guise of exerting the power of taxing."' "

And, at pages 141-2, he said:

"Even assuming that a State does not, under the Constitution of the United States, possess unlimited

power to curtail the power of disposition of property at death or the privilege of receiving it by way of inheritance, there is nevertheless no constitutional guaranty of equality of taxation. The power of the States to discriminate in fixing the amount and incidence of taxation upon inheritances is undoubted. * * *

"The guaranty of the Fourteenth Amendment of the equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a State."

Taxation pursuant to the power to regulate succession to property is similar to taxation imposed by a state for the privilege enjoyed by its corporations in exercising their corporate franchises or to the power which a state has in imposing taxes upon foreign corporations as a condition of their being permitted to do business within the state.

This principle is established in *Plummer v. Coler*, 178 U. S. 115. At page 137 it was said:

"* * * we may regard it as established that the relation of the individual citizen and resident to the State is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right, as legatee, devisee or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the State, and we are unable to perceive any sound distinction that can be drawn between the power of the State in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to

receive property under the statutes regulating the descent of the property of decedents."

The broad extent of the power of the state in taxing corporate franchises granted by it is illustrated by the decision in *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 313, where it was said:

"The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant, as well as, also, of its continued exercise, the payment of a specific sum to the State each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence."

In the exercise of its taxing power and its power to regulate the succession to property a state may measure a transfer tax in any way that is not unreasonable or arbitrary. The state of New York is not confined to a measurement based solely upon the value of the property transferred as of the time of the transfer, but it is quite competent for it to measure the tax on contingent transfers on the basis of the full, undiminished value of the property transferred as of the time of the transfer, particularly when, as has been shown, the use of the tax is not actu-

ally received by the state until the contingencies happen. The tax is specific, not *ad valorem*. (Union Trust Co. v. Probate Judge, 125 Mich. 487.)

> "* * * the Fourteenth Amendment does not deprive a State of the power to regulate and burden the right to inherit, but at the most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority."
>
> *Campbell v. California*, 200 U. S. 87, 95.

A leading case upon this point is *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, where, at page 237, the court say:

> "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, *and those of like character, so long as they proceed within reasonable limits and general usage*, are within the discretion of the state legislature, or the people of the State in framing their Constitution." (Italics ours.)

Indeed, it has been said that no constitutional objection lies in the way of a legislative body prescribing any method of measurement to determine the amount it will charge for the privileges it bestows.

Home Insurance Co. v. New York, 134 U. S. 594, 600.

The following are examples of methods of measuring taxes which have been sustained by this court:

In *The Delaware Railroad Tax* case, 18 Wall. 206, a tax was imposed by the state of Delaware of one-fourth of one per cent upon the actual cash value of every share of the capital stock of the railroad company, with provision that if the line of the railroad lay partly in Delaware and partly in another state or states the company should only be required to pay the tax on such number of the shares of its capital stock as would be in that proportion to the whole number of shares which the length of the road within the limits of the state should bear to the whole length of the road. It was stated that this provided for a greater amount of tax than would have resulted if the apportionment had been made on the basis of the value of the property within and without the state. The court recognized that if the tax were upon the property of the railroad there would be great difficulty in sustaining it, but held that the tax was not upon the property of the railroad but "upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock; a rule which, though an arbitrary one, is approximately just, at any rate is one which the legislature of Delaware was at liberty to adopt." (p. 231.)

The court further said (p. 231):

"The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

A tax measured by nominal or face value of corporate securities instead of actual value was sustained in *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, *supra*, and also in *Chester City v. Pennsylvania*, 134 U. S. 240.

A tax so measured was sustained in *Hatch v. Reardon*, 204 U. S. 152, although in one instance the actual value was $30.75 per share of $100.00 face value and in another instance $172.00 per share of $100.00 face value.

A privilege tax on corporations may be measured by income from property although a direct tax on such property would be prohibited.

Flint v. Stone Tracy Co., 220 U. S. 107.

See also

Home Insurance Co. v. New York, 134 U. S. 594;

Society for Savings v. Coite, 6 Wall. 594;

Provident Institution v. Massachusetts, 6 Wall. 611.

An excise tax may be imposed upon a foreign corporation measured by its entire capital stock, even though the corporation is engaged in interstate as well as intrastate commerce, if such tax does not burden the interstate commerce and is levied upon a legitimate subject of state taxation.

Baltic Mining Co. v. Massachusetts, 231 U. S. 68.

In *Roberts & Schaefer Co. v. Emmerson*, 271 U. S. 50, it was held that the state of Illinois might impose a franchise tax on domestic corporations measured by the par value of shares having par value or in the case of no par value shares on the basis of $100 per share, and in so doing did not violate the provisions of the fourteenth amendment to the constitution of the United States, for the reason that no par value shares may reasonably be classified differently from par value shares even though, concededly, all shares without par value were not of the value of $100, or of the same value, inasmuch as the statute permitted no par value shares to be issued for money or property of not less than five dollars nor more than one hundred dollars per share.

In *Bass, Ratcliff & Gretton, Limited v. State Tax Commission*, 266 U. S. 271, a franchise tax imposed upon a foreign corporation for the privilege of doing business in the state of New York was held not to violate the due process clause of the fourteenth amendment to the constitution of the United States by reason of the fact that in measuring the tax the amount of net income of the corporation to be used as the base was determined by the allocation to the state of so much of the entire net income of the corporation from business carried on both within and without the state as the value of its real property, tangible personal

property, bills and accounts receivable and shares of stock of other corporations within the state bore to the aggregate value of the corporation's real property, tangible personal property, bills and accounts receivable and shares of stock of other corporations.

A tax upon railroads at the average rate of taxation imposed on all of the property within the state subject to *ad valorem* taxes is not unconstitutional.

Michigan Central Railroad Co. v. Powers, 201 U. S. 245, *supra*.

A law of the state of New Jersey provided for an inheritance tax graduated as to rate according to the value of the entire estate and required that where the estate included property both within and without the state, the tax should be computed as if all of the property were within the state and so much of the tax so computed should be payable to the state as the value of the property of the estate within the state should bear to the entire value of the property of the estate within and without the state. This method of measuring the tax was sustained in *Maxwell v. Bugbee*, 250 U. S. 525.

The tax approved in *Maxwell v. Bugbee*, was discussed by the New Jersey Court of Errors and Appeals in *Carr v. Edwards*, 84 N. J. L. 667, 669, in the following language:

> "It is true that the tax is not necessarily five per cent upon the whole New Jersey succession. The amount depends on the ratio of the New Jersey property to the entire estate wherever situated. This, however, merely affords a measure of the tax imposed; the tax is still by the very words of the section imposed upon the property located within this state."

See also:

Maine v. Grand Trunk Railway Co., 142 U. S. 217;

Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379;

Gorham Mfg. Co. v. Travis, 274 F. 975, aff'd *sub nom. Gorham Mfg. Co. v. Tax Comm.*, 266 U. S. 265;

New York State v. Roberts, 171 U. S. 658.

It may be observed that the basis for the measurement of the tax prescribed by the statute under examination is much more reasonable than that employed in the *Maxwell v. Bugbee* case. There, in practical effect, it would seem that the basis of measurement was such that a tax was imposed upon property over which the state of New Jersey had no jurisdiction because it was situated beyond its borders. Concededly, the New Jersey case is on the border line, but if the tax there imposed was consistent with the constitution of the United States, particularly the fourteenth amendment thereto, surely it would seem that the method of measurement employed by the state of New York in imposing its tax is beyond question constitutional.

We think that if the state of New York should have seen fit to place contingent transfers in a class by themselves and to enact that a tax should be imposed thereon at the highest possible rate under any contingency, such tax being made payable as of the date of the decedent's death and without possibility of adjustment or refund, such a law, although open to question on grounds of equity and fairness, could not be successfully attacked as denying due process of law or equal protection of the laws. However, we are not confronted with such a law but with one which is entirely fair and equitable and which gives every evidence that the legislature in adjusting the state's system

of taxation has gone to great length in its endeavor to equalize the burden and do justice to all concerned.

Plaintiffs-in-error contend that the same portion of decedent's estate is taxed twice and that the aggregate value of the shares of the beneficiaries is arbitrarily fixed at a sum in excess of the value of the whole estate, resulting in a purely fictitious item of tax. Manifestly, these contentions are incorrect. No portion of the estate is taxed more than once. The life estate is taxed and the remainder is taxed. The tax upon the life estate is measured by its value computed as of the date of the transfer, whereas the tax upon the remainder is measured in a different manner but nevertheless it is only the remainder which is taxed.

If the argument of the plaintiffs-in-error is correct the statutes of those states which tax remainders on the basis of the value of the property transferred as of the date of vesting in possession or enjoyment without deduction for or on account of any intervening estate or interest are also subject to condemnation, for under those statutes substantially the same result is obtained as under the New York law.

Several states impose a tax on the full, undiminished value of all remainders as of the date of vesting and one (Kansas) applies this method only in the case of contingent remainders, classifying the same separately from vested remainders as does New York.

See:

Tax Code of Virginia, section 106;

Pennsylvania Act of June 20, 1919, P. L. 521, section 3;

Massachusetts General Laws, ch. 65, sections 13, 14;

General Statutes of Kansas, sections 79-1505.

The power of a state to impose a transfer tax to attach at some other time than the instant of death is settled. The time when the tax shall attach is within the discretion of the state legislature.

An absolute and irrevocable transfer *inter vivos*, but intended to take effect in possession or enjoyment at or after the transferor's death, may be taxed as of the date of the transferor's death instead of the date of the execution of the deed of transfer.

Keeney v. New York, 222 U. S. 525, *supra*.

In the *Keeney* case it was said (p. 537):

> "But the statute does not impose a tax on the property, but on the transfer. The validity of that burden must be determined by the situation as it existed in 1903, when the deed was made. At that time the grantor was a resident of the State of New York. This personal property there had its situs. She there made a transfer, which was taxable, regardless of the residence of the trustee or beneficiary. The fact that the assessment and payment were postponed until the death of the grantor would be a benefit to the remainderman in the many instances in which values decreased. But where the power to tax exists, it is for the State to fix the rate *and to say when and how the amount shall be ascertained and paid*. The fact that the liability was imposed when the transfer was made in 1903, and that payment was not required until the death of grantor in 1907, does not present any Federal question." (Italics ours.)

A transfer tax may be imposed at the time when a contingent remainder vests. It was so held by this court in *Cahen v. Brewster*, 203 U. S. 543. In that case, at page 550, this court say:

"The tax was defined in the *Perkins case* to be 'not a tax upon the property itself, but upon its transmission by will or descent'; and in the *Magoun case*, 'not one on property, but one on the succession'. In *Knowlton v. Moore* it was said that such taxes 'rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested'. But these definitions were intended only to distinguish the tax from one on property, and it was not intended to be decided that the tax must attach at the instant of the death of a testator or intestate. In other words, we defined the nature of the tax; we did not prescribe the time of its imposition. To have done the latter would have been to prescribe a rule of succession of estates and usurp a power we did not and do not possess. There is nothing, therefore, in those cases which restrains the power of the State as to the time of the imposition of the tax. It may select the moment of death, or it may exercise its power during any of the time it holds the property from the legatee. 'It is not', we said in the *Perkins case*, 'until it has yielded its contribution to the State that it becomes the property of the legatee'."

Applying the reasoning of the foregoing quotation to the situation in the state of New York with respect to the taxation of contingent transfers, we find that the state in the exercise of its power to regulate succession to property on the death of the owner has, in effect, enacted that the tax on contingent transfers shall be payable when the same vest in possession and enjoyment and that pending the

vesting thereof, a portion of the property of the decedent's estate sufficient to insure payment of the largest amount of tax that may eventually be found due shall be impounded and held until the estate has yielded its contribution to the state. It is submitted that there cannot be doubt as to the power of the state to regulate the succession in this manner.

In *Moors v. Treasurer and Receiver General*, 237 Mass. 254, the supreme judicial court of Massachusetts sustained a law which taxed remainders at the time they vested on the basis of the then value of the property. A remainder valued at $475,000 at the time of a decedent's death was taxed at a value of $547,040, its value at the time it fell in.

If a state may impose a death tax on property conveyed by an irrevocable deed *inter vivos* intended to take effect at death on the basis of the value of the property transferred at the time of the transferor's death, and may tax remainders on the basis of their value when they fall in, without deduction for or on account of intervening estates or interests, or may tax the exercise of a power of appointment on the basis of the value of the property at the time of such exercise (Orr v. Gilman, 183 U. S. 278) even though the succession is from the donor and not the donee of the power, we see no reason why the state of New York may not tax contingent transfers at the time they vest in possession or enjoyment on the basis of the full, undiminished value of the property transferred as of the time of the decedent's death, without deduction for or on account of any intervening estate or interest. It is probable that in most cases this method will result in a lesser tax than would be imposed if the value were taken as of the time of vesting in possession and enjoyment. Certainly

in very few cases would it result in a greater tax. In any event, the statute does not produce a result which places it in conflict with the fourteenth amendment to the constitution of the United States.

Absolute equality and uniformity in the operation of a taxing statute is not required. In fact, it is impossible of attainment. The constitutional guarantees of equal protection of the laws and of due process are not to be invoked unless the inequalities and lack of uniformity are so gross as to amount to an arbitrary taking of property in violation of the inherent rights of the taxpayer.

Board of Education v. Illinois, 203 U. S. 553, *supra;*
Billings v. Illinois, 188 U. S. 97, *supra;*
Cahen v. Brewster, 203 U. S. 543, *supra.*

It was said in *Beers v. Glynn*, 211 U. S. 477, 485, *supra:*

> "Indeed, it may be laid down as a general rule that mere inequalities or exemptions in the matter of state taxation are not forbidden by the Federal Constitution."

It must always be remembered that a testator is not obliged to create a contingent remainder and if he does not fancy the law under which such remainders are taxed, he may readily relieve himself from the effect of it by failing to create them.

In *New York Trust Company v. Eisner*, 256 U. S. 345, this court was discussing the claim that the federal estate tax law of 1916 would produce inequalities affecting legatees and said (p. 349):

"As to the inequalities in case of a will they must be taken to be contemplated by the testator. He knows the law and the consequences of the disposition that he makes."

The court will consult the convenience of the taxing power in determining the validity of a taxing act (*Hatch v. Reardon*, 204 U. S. 152, *supra*) and will not interfere with a method of taxation which has been developed as the one most suited to the state's system of taxation, as is the case with respect to the New York law.

As was said in *King v. Mullins*, 171 U. S. 404, 436:

"The judiciary should be very reluctant to interfere with the taxing systems of a State, and should never do so unless that which the State attempts to do is in palpable violation of the constitutional rights of the owners of property."

See also

Florida Central &c. R'd Co. v. Reynolds, 183 U. S. 471.

In discussing the claim that a tax was an arbitrary discrimination, Mr. Justice Holmes in *Hatch v. Reardon*, 204 U. S. 152, 158, *supra*, said:

"This objection to a tax must be approached with the greatest caution."

In *Michigan Central Railroad Co. v. Powers*, 201 U. S. 245, 292-3, it was said:

"There is no general supervision on the part of the Nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign, both as to objects and methods."

And Mr. Justice Holmes in *Wheeler v. Sohmer*, 233 U. S. 434, 439, said:

> "The necessity of caution in cutting down the power of taxation on the strength of the Fourteenth Amendment often has been adverted to."

In speaking of the fourteenth amendment in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, *supra*, at page 293, the court say:

> "* * * it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned."

In *Orr v. Gilman*, 183 U. S. 278, 283, *supra*, this court say:

> "This court has no authority to revise the statutes of New York upon any grounds of justice, policy, or consistency to its own constitution. Such questions are concluded by the decision of the legislative and judicial authorities of the State."

The New York act of 1925 in no way infringes the fourteenth amendment. The tax operates alike on all persons and property similarly situated and the assessment is made by a judicial officer after notice and an opportunity to be heard. There is a presumption of constitutionality surrounding taxing laws which is stronger than that which applies to other laws and which this court will invoke if necessary to sustain the act.

In *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 615, it was said:

> "As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme

law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments."

See also

San Diego Land and Town Company v. National City, 174 U. S. 739.

The clause of the fourteenth amendment to the constitution of the United States which prohibits a state denying to any citizen the equal protection of the law "only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

Kentucky Railroad Tax Cases, 115 U. S. 321, 337.

We think this court might well decide this case by using the same language which it employed in *Orr v. Gilman*, 183 U. S. 278, *supra*, at 287, when it said:

"In the light of the principles thus established we are unable to see in this legislation of the State of New York, as construed by its highest court, any infringement of the salutary provisions of the Fourteenth Amendment. There are involved no arbitrary or unequal regulations, prescribing different rates of taxation on property or persons in the same condition. The provisions of the law extend alike to all estates that descend or devolve upon the death of those who once owned them. The moneys raised by the taxation

> are applied to the lawful uses of the State, in which the legatees have the same interests with the other citizens. Nor is it claimed that the amount or rate of the taxation is excessive to the extent of confiscation."

No better illustration of the equality of the tax on contingent transfers could be found than is exhibited by the first table on page 28 of the brief of plaintiffs-in-error, which shows four cases in each of which the value of the property transferred is $500,000, but in each case the age of the life tenant is different, resulting in different valuations for the remainders, if ascertained as of the date of the transfer by deducting the values of the life estates. If the effect of the law was to impose a tax on these remainders as of the date of the decedent's death, there might be cause for complaint of inequality. The fact is that the tax is not imposed until the remainders fall in. Then each of the remaindermen will receive $500,000, and the tax on the amount which each will receive will be $16,750. Absolute equality is the result.

In the second table on page 28 of the brief of plaintiffs-in-error it is shown that the total tax on the life estates and remainders referred to in the first table will vary. This is true, but the cause for the variation is not found in the taxation of the remainders. It is due to the different valuations of the life estates, concerning which no question is presented here.

The valuation of life estates by the use of mortality tables produces flagrant inequalities, and necessarily so, because mortality tables represent averages involving many thousands of lives, producing results which rarely, if ever, fit the individual case. There would be much bet-

ter reason for attacking a law requiring that life estates be valued on the basis of mortality tables than exists for attack upon the law of New York taxing contingent transfers. Nevertheless, the courts have repeatedly sustained the valuation of life estates according to mortality tables.

In *Simpson v. United States*, 252 U. S. 547, 550, it was said:

> "Of the two claims of error argued, the first is, that the Court of Claims erred in refusing to hold that it was illegal to use mortuary tables * * *.
>
> "The objection is not to the particular table that was used but to the use of any such table at all—to the method. Such tables, indeed the precise table which was made the basis of the one used by the collector, had been resorted to for many years prior to 1899 by courts, legislatures and insurance companies for the purpose of determining the present value of future contingent interests in property * * *. Both the method and the rate adopted in this case have been assumed by this court, without discussion, as proper in computing the amount of taxes to be collected under this War Revenue Act in *Knowlton v. Moore*, 178 U. S. 41, 44; *United States v. Fidelity Trust Co.*, 222 U. S. 158; *Rand v. United States*, 249 U. S. 503, 506, and in *Henry v. United States*, 251 U. S. 393. It is much too late to successfully assail a method so generally applied, and as to this claim of error the judgment of the Court of Claims is affirmed."

See also

Matter of White, 208 N. Y. 64, *supra*.

It is suggested in the brief of plaintiffs-in-error, at pages 10 and 12, that the New York transfer tax is similar

in nature to the federal estate tax, which has been defined as one upon the transfer of his net estate by a decedent. The New York transfer tax is not an estate tax, but an inheritance or share tax. It is not assessed against the estate as a whole but is assessed against the share of each beneficiary. The distinction is brought out in *Knowlton v. Moore*, 178 U. S. 41, *supra*, 66, where it was said:

> "One of two things must arise. When the rate of tax is thus calculated upon the particular attitude to the deceased of each of the legatees or distributees, the sum of the tax must be deducted either from each particular legacy or from the mass of the whole personal estate. If it is deducted from each particular legacy, then it is manifest that the tax imposed will have been levied, not upon the mass of the estate, but upon each particular legatee or beneficiary, since the share of such person will have paid a rate of taxation predicated upon the amount of the legacy and the relationship, or want of relationship, of the particular recipient thereof to the deceased. This being the case, no room would be left for the contention that the tax was imposed on the whole estate. On the other hand, if the whole sum of the taxation on all the shares, calculated on the basis of the relationship of each beneficiary and the amount received, be deducted from the mass of the estate, then, each recipient would pay only a proportion of the amount without reference to his relationship to the deceased. This would result in imposing the tax on the whole personal estate, and ratably distribute the burden among all the beneficiaries. But to reach this the entire classification, grading the rate of the tax by the degrees of relationship, would have to be disregarded."

The New York cases cited by plaintiffs-in-error on page 10 of their brief to show that the tax is upon the clear market value of the property at the time of death were decided before the enactment of chapter 144 of the laws of 1925, and merely stated the law existing when they were decided. They were all cited by plaintiffs-in-errors in their brief in the court of appeals. As the law now stands, the tax is the same as it was when the cases referred to were decided, with the exception that contingent transfers have been classified separately and are taxed in a different manner.

Defendants-in-error contend that the New York transfer tax as applied to contingent transfers is a practical method of taxation adapted to the requirements and the tax system of the state of New York and in full accord with the policy of that state. The law is not arbitrary, capricious, oppressive, discriminatory or inconsistent with natural justice. It does not produce gross inequality or confiscation. The basis of classification is entirely reasonable and proper. Viewed from the standpoint of its actual application, it imposes no hardship except in the sense that all taxation may be regarded as imposing hardship.

In the words of this court in *Nicol v. Ames*, 173 U. S. 509, at page 516,

> "Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

We may sum up the argument of defendants-in-error in the words of Mr. Justice Clarke in *Dane v. Jackson*, 256 U. S. 589, 601:

> "The case presented is clearly not one of that extreme inequality in taxation of which the Federal courts should lay hold, but involves rather a question of state policy, of a character which the people have been satisfied to leave to the judgment, patriotism and sense of justice of representatives in their state legislature."

POINT III.

The judgment of the Court below should be affirmed.

Respectfully submitted,

SETH T. COLE,
Counsel for Defendants-in-error.

Appendix "A."

The following are the provisions of New York laws of 1925, ch. 144, except that for convenience matter deleted from the transfer tax law by such chapter is also shown. New matter added by that chapter is italicized and matter which was deleted is enclosed in brackets.

Section 1. Section two hundred and thirty of chapter sixty-two of the laws of nineteen hundred and nine, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws," as last amended by chapter

six hundred and fifty-seven of the laws of nineteen hundred and twenty-four, is hereby amended to read as follows:

§230. *Proceedings by appraiser.* In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion, or upon the application of any interested person, including the tax commission, shall by order direct the person or one of the persons appointed pursuant to section two hundred and twenty-nine of this chapter in counties in which the office of appraiser is salaried, and in other counties, the county treasurer, to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article.

Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the tax commission, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall at such time and place appraise the same at its fair market value as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to said matter as the surrogate may order or require. Every appraiser, except in the counties in which the office of appraiser is salaried, for which provision is hereinbefore made, shall be paid his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall

be the same as those now paid to witnesses subpoenaed to attend in courts of record, payment to be made out of moneys appropriated for such purpose. No deduction shall be allowed from the appraised value of the property transferred on account of any liability of decedent incurred or assumed by the acquisition, care, improvement, use, enjoyment or disposition of property without the state, the transfer of which is not subject to tax under the provisions of this article. Any transfer of his property made by a decedent by deed, sale or gift within two years prior to his death, without a valid and adequate consideration therefor, shall be presumed to have been made in contemplation of death within the meaning of this chapter.

The value of every future or limited estate, income, interest or annuity for any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum.

In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgement, defeat or diminution of said estate or property or

interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the encumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this chapter.

Where any property shall, after the passage of this chapter, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this article in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interest is derived.

When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, *which tax shall be computed on the full, undiminished value of such property at the time of the transfer without deduction for or on account of any intervening estate or interest*, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property

transferred, and the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, *computed upon the full, undiminished value of the property as aforesaid;* and the executor or trustee of each estate, or the legal representative having charge of the trust fund, shall immediately upon the happening of said contingencies or conditions apply to the surrogate of the proper county, upon a verified petition setting forth all the facts, and giving at least ten days' notice by mail to all interested persons or corporations, for an order modifying the temporary taxing order of said surrogate so as to provide for the final assessment and determination of the tax in accordance with the ultimate transfer or devolution of said property. [Such return of overpayment shall be made in the manner provided by section two hundred and twenty-five of this chapter.] *If application for modification of the temporary taxing order is not made within six months after the happening of any contingency or condition the tax as finally fixed and determined shall bear interest at the rate of six per centum per annum from the date when such contingency or condition happened to the date of the entry of the modifying order, which interest shall be in addition to the interest imposed by section two hundred and twenty-three of this article for non-payment of the tax at the highest possible rate within*

eighteen months from the date of the transfer. Whenever a tax on a transfer dependent on a contingency or condition has been determined at the highest rate in the manner prescribed by the foregoing provisions [,] *and the personal property included in the transfer is less than the amount of said tax*, the executors or trustees, in lieu of paying the [total] amount so determined, may elect to file in the office of the [surrogate] *tax commission* a bond to the people of the state, approved as to form and amount by the [surrogate] *tax commission*, for the purpose of securing the payment of the [difference between the] tax on such transfer [,] [at the highest rate and the tax on such transfer which would be due if the contingency or condition had happened at the date of the appraisal of such estate and to pay in cash the balance of such tax as so determined; and it shall be the duty of the executor or trustee of each estate, or the legal representative having charge of the trust fund, upon the happening of such contingency or condition, to apply forthwith to the Surrogate for an order fixing the tax on such transfer in accordance with the ultimate devolution thereof]. The [Surrogate] *tax commission* at any time may [make an order increasing or decreasing] *increase or decrease* the amount of such bond as [justice] *conditions* may require.

Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting.

The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the tax commission.

§2. Section two hundred and forty-one of such chapter as last amended by chapter four hundred and seventy-six of the laws of nineteen hundred and twenty-one, is hereby amended to read as follows:

§241. *Disposition of revenues; tax on contingent remainders; refunds in certain cases.* The tax commission shall deposit all taxes collected by it under this article, except as hereinafter otherwise provided, in a responsible bank, banking house or trust company in the city of Albany, which shall pay the highest rate of interest to the state for such deposit, to the credit of the state comptroller on account of the transfer tax. And every such bank, banking house or trust company shall execute and file in his office an undertaking to the state, in the sum, and with such sureties, as are required and approved by the comptroller, for the safe keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as the comptroller may fix. Every such undertaking shall have indorsed thereon, or annexed thereto, the approval of the attorney-general as to its form. The tax commission shall on the first day of each month make a verified return to the state treasurer of all taxes received by it under this article, stating for what estate, and by whom and when paid; and shall credit itself with all expenditures made since its last previous return on account of such taxes, for refunds lawfully charge-

able thereto. The comptroller shall on or before the tenth day of each month pay to the state treasurer the balance of such taxes remaining in his hands at the close of business on the last day of the previous month.

Whenever the tax on a contingent remainder has been determined at the highest rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the tax commission, in the counties wherein this tax is payable direct to it, and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate [so much of] the tax assessed upon such contingent remainders [as represents the difference between the tax at the highest rate and the tax upon such remainders which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate], and the tax commission or the county treasurer shall deposit the amount of tax so retained in some solvent trust company or trust companies or savings banks in this state designated by the state comptroller, to the credit of the state comptroller on account of such estate, paying the interest thereon when collected by him to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will. Upon the happening of the contingencies or conditions whereby the remainder ultimately vests in possession, if the remainder then passes to persons taxable at the highest rate, the state comptroller on the certificate of the tax commission, shall turn over the amount so retained to the state treasurer as provided herein and by section two hundred and forty of this chapter, or if the remainder ultimately vests in persons taxable at a lower rate or a person or corporation exempt from taxation by the provisions of this article, the state comptroller on the certificate of the tax commission

shall refund any excess of tax so held to the executor or trustee of the estate, to be disposed of by said executor or trustee as provided by the decedent's will. Executors or trustees of any estate may elect to assign to and deposit with the tax commission or the county treasurer, bonds or other securities of the estate approved by the tax commission [or the county treasurer], both as to the form of the collateral and the amount thereof, for the purpose of securing the payment of the [difference between the] tax on said remainder [at the highest rate and the tax upon said remainder which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate, and cash for the balance of said tax as assessed], which said bonds or other securities shall be held by the tax commission, or the county treasurer to the credit of said estate until the actual vesting of said remainders, the income therefrom when received by the tax commission or the county treasurer to be paid over to the executor or trustee during the continuance of the trust estates [and then to be finally disposed of in accordance with the ultimate transfer or devolution of said remainders as hereinbefore provided; and it shall be the duty of the executors or trustees of such estates to forthwith notify the tax commission of the actual vesting of all such contingent remainders].

If any executor or trustee shall have deposited with the tax commission or the county treasurer, cash or securities, or both cash and securities, to an amount in excess of the sum necessary to pay the transfer tax upon such contingent remainders, [at the highest rate as aforesaid,] the excess of tax so deposited shall be returned to the executor or trustee, or if any executor or trustee shall have deposited with the tax commission, or the county treasurer, cash or securities, or both cash and securities, to an amount less

than is sufficient to pay the tax upon such contingent remainders as finally assessed and determined, the executor or trustee of said estate shall forthwith, upon the entry of the order determining the correct amount of tax due, pay to the tax commission, or the county treasurer, whichever is entitled under the provisions of this article to receive the tax, the balance due on account of said tax. *In case securities shall have been deposited and the tax upon such contingent remainders as finally assessed and determined shall be paid, the executor or trustee shall be entitled to the return of such securities; but if the tax is not paid within sixty days after the entry of the order finally assessing and determining the tax, the tax commission may sell the securities so deposited in the open market or at public auction, at its option, and apply the proceeds thereof to the payment of the tax.* If on account of the time or manner of payment of a tax under this article it be impossible to identify or separate the portion thereof paid on account of a contingent remainder pursuant to this section and the whole of such payment shall have been deposited in the state treasury, the portion of the tax on account of such contingent remainder to be held or deposited on account of the estate pursuant to this section shall be deemed a refund under this article, and shall be drawn, on the certificate of the tax commission and approval of the comptroller, from moneys deposited with the state comptroller and available for refunds under this article, and when so drawn shall be deposited to the credit of the state comptroller on account of the estate as provided by this section. Bonds or other securities to be deposited with the tax commission pursuant to this section shall be turned over by it to the state comptroller for safe keeping.

§3. This act shall take effect immediately.

Appendix "B."

MEMORANDUM.

In re Bill to Amend the Transfer Tax Law relative to the taxation of contingent remainders.

An explanation of the purposes of this bill makes it necessary to briefly trace the history of the taxation of contingent remainders under the transfer tax law.

Originally, the taxation of contingent remainders was suspended until the remainders fell in, at which time they were taxed on the full, undiminished value of the property transferred at the time it vested in possession and enjoyment and without deduction on account of the value of any intervening estate. It will be observed that this was substantially the equivalent of a tax on the remainders payable at the time of the transfer, computed on the value of the property less value of the intervening estate, for the tax so determined with interest would amount at the time the remainder fell in to the tax computed at that time on full, undiminished value.

Suspension of the taxation of contingent remainders led to much confusion and the state eventually lost considerable sums of tax by reason of inability to follow up the remainders. To remedy this condition the law was amended in 1899 to provide for the immediate taxation of contingent remainders at the time of the transfer at the highest possible rate, the tax being computed on the value of the property transferred with allowance for the value of the intervening estate, and as so computed was payable forthwith out of the property transferred. When the re-

mainder vested in possession and enjoyment, if it developed that an excess tax had been collected, such tax was returned with interest at 6% per annum from the time it was paid. The rate of interest was later reduced to 3% per annum. This method of taxation was sustained by the courts but in so doing the courts pointed out that it worked an injustice on the life tenant, for the reason that it deprived him of the income from a portion of the principal of the estate. To remedy this the law was changed to its present form and provides that the tax on a contingent remainder shall be determined at the highest possible rate and also at the rate which would be payable if the contingency had happened at the date of the appraisal. The tax at the low rate is immediately covered into the state treasury and the difference between the low and high rate is deposited to the credit of the estate pending the falling in of the remainder and while so held the income is paid to the executor or trustee for the benefit of the life tenant. In lieu of paying the difference between the low and high rate in cash the executor or trustee may deposit bonds or other securities to secure such amount and receive the income therefrom until the remainder vests. Provision is also made that instead of paying the difference between the low and high rate or depositing securities a bond may be given to secure the amount.

The present method of taxing contingent remainders is open to two objections; first, the life tenant is still deprived of the income on the amount which is taken and covered into the state treasury to pay the tax at the low rate and to that extent an injustice is being worked. Second, the value of the remainder is determined as of the time of the transfer by deducting from the value of the property transferred the value of the intervening estate,

whereas of the tax computed on the value thus determined the state does not receive the benefit of the difference between the low and high rate until the remainder vests. This works an indefensible discrimination against the vested remainder man in favor of the contingent remainder man. The vested remainder is taxed at the time of the transfer on the value of the property at that time less the value of the intervening estate, but the tax is payable at once by the remainder man and is covered into the state treasury, so that the state has the use of the money immediately. In the case of the contingent remainder the tax is computed by the same method of valuation as in the case of the vested remainder, but the state does not receive the use of the difference between the tax at the low and the high rate until the remainder vests. Under the 1899 act and the law prior thereto, when the remainder fell in the state received the equivalent of the tax on the value of the contingent remainder at the time of the transfer, less the value of the intervening estate, plus the use of the money from the time of the transfer, whereas under the present law a part of the tax on the contingent remainder is computed on the value of the property at the time of the transfer less the intervening estate, but the state loses the use of the money from the time of the transfer until the remainder falls in.

Perhaps the situation can be best explained by a concrete illustration: Assume that a man dies leaving a principal fund of $100,000, the life use of which is given to his widow with remainder to his son, if he be living at the time of the widow's death, or if the son does not survive the widow the remainder to go to a nephew. This creates a contingent remainder. The value of the widow's life estate is $25,000, which leaves $75,000 as the value of the

remainder at the time of the transfer. The taxing order under existing law will provide for a minimum tax on the remainder of $1,150, which would be the amount due in the event the remainder vests in the son, and it would also provide for a maximum tax of $4,250 which would be the amount in the event the remainder vests in the nephew. The tax of $1,150 is immediately payable but the difference of $3,100 may be provided for in one of three ways, i. e.,

(1) It may be paid in cash, whereupon the payment will be deposited and held until the remainder vests. If the remainder vests in the son the deposit will be refunded but if it vests in the nephew it will be applied to pay the tax. Until the remainder vests the interest on the deposit is paid to the executor or trustee for the benefit of the widow.

(2) In lieu of paying $3,100 in cash the executor or trustee may deposit bonds or other securities and receive the income therefrom until the time when the remainder vests.

(3) The executor or trustee may give a bond to insure the payment of the $3,100 if the remainder vests in the nephew.

Assuming that the remainder ultimately vests in the nephew, it will be noted that although the tax is computed on the value of the remainder at the time of the decedent's death and the value of the widow's life estate deducted, the state does not receive the use and benefit of the tax until after the widow's death. If instead of a contingent remainder the nephew had taken a vested remainder, the state would receive the same amount of tax but it would all be payable absolutely at the time of the decedent's death and from that time the state would have the use and benefit thereof. In the case of the contingent remainder vest-

ing in the nephew the state has lost the use of $3,100 from the date of the decedent's death to the date of the vesting of the remainder.

The bill corrects both of the defects in the law. It gives the life tenant the income from the entire estate and it taxes the remainder on the full value of the property transferred without deduction of the intervening estate. The use and benefit of this tax vests in the state when the remainder falls in and it is, therefore, the equivalent of the use and benefit of a tax on the value of the property, less the value of the intervening estate, payable at the time of the transfer. The discrimination between the vested remainder man and the contingent remainder man is removed. Adjustment of the tax is made when the remainder falls in if it then vests in a person taxable at less than the highest rate.

January 31, 1925.

NOV 27 1928

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 80.

NETTIE I. SIMONSON, ETTIE B. SIMONSON and FARMERS' LOAN AND TRUST COMPANY, etc.,
Plaintiffs-in-Error,

versus

STATE TAX COMMISSION OF NEW YORK,
Defendants-in-Error.

BRIEF FOR DEFENDANTS-IN-ERROR.

SETH T. COLE,
Counsel for Defendants-in-Error.

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There were no opinions below except in the Appellate Division, First Department, which is reported at 219 App. Div. 656. The case in the Court of Appeals is reported at 246 N. Y. 601.

POINT I.

The judgment of the Surrogates' Court entered on the remittitur of the Court of Appeals should be affirmed.

The questions raised in this case are the same as those in *Salomon, et al., etc. v. State Tax Commission of New*

York, No. 79 on the calendar of the October Term, 1928. The two cases are to be argued together. The brief for the State Tax Commission in the *Salomon* case fully sets forth its contentions and the arguments of said brief will not be here repeated but counsel for defendants-in-error desires to incorporate the arguments of said brief herein by reference with the same force and effect as if they were set out herein at length. Copies of the brief in the *Salomon* case have been furnished plaintiffs in error herein. Defendants-in-error believe that the decision in the *Salomon* case will necessarily be controlling in this case and that the arguments in its brief in that case constitute a full and complete answer to the points made by plaintiffs-in-error herein.

Only one observation will be made and that is in reference to the language of the New York Court of Appeals in *Matter of Terry*, 218 N. Y. 218, 223, quoted at page 10 of the brief of plaintiffs in error. This language, of course, applied to the facts in that case and was not intended to be a general statement applying to all cases under the transfer tax law of New York. It did not apply to the then existing provision for the taxation of contingent transfers on the basis of the full, undiminished value of the property transferred as of the time of the transfer, which the Court of Appeals had approved of in its opinion in *Matter of Seligmann*, 219 N. Y. 636. No more can it apply to the subsequent enactment of the Legislature of the State of New York by Chapter 144 of the Laws of 1925, which the Court of Appeals has sustained.

Respectfully submitted,

SETH T. COLE,
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